

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PARENTS IN COMMUNITY ACTION, INC.

and

Case 18-CA-14406

MINNESOTA FEDERATION OF TEACHERS

and

Case 18-CA-14484

BRETT FELDMAN, An Individual

Florence I. Brammer and Karen Nygren Wallin,
of Minneapolis, MN, appearing for the General
Counsel.

Garber and Metcalf, by Richard L. Kaspari, of
St. Louis Park, MN, appearing for the Union.

Brett Feldman, of Minneapolis, MN, appearing
pro se.

Law Offices of Martin L. Garden, by Martin L.
Garden and Jon S. Olson, of Minneapolis, MN,
and Shulman, Walcott & Shulman, by John G.
Shulman, of Minneapolis, MN, appearing for
the Respondent.

DECISION

Statement of the Case

WILLIAM J. PANNIER III, Administrative Law Judge: I heard this case in Minneapolis, Minnesota on July 9 through 11, August 11 through 15, 18 and 19, and on November 17 and 18, 1997.¹ On May 29 the Regional Director for Region 18 of the National Labor Relations Board, herein called the Board, issued an Order Consolidating Cases, consolidating for hearing and decision the Complaint in Case 18-CA-14406, issued on May 16 based upon an unfair labor practice charge filed on March 14 and amended on May 9, and the Complaint in Case 18-CA-14484, issued on May 29 based upon an unfair labor practice charge filed on May 22 and amended on May 29, alleging violations of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. Sec 151 *et seq.*, herein called the Act. All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine

¹ For the most part, the dates of events in this case occurred during the 1996-1997 school year: late Summer and Fall of 1996 and Winter and Spring of 1997. Thus, unless otherwise stated, all dates during the months of September through December occurred during 1996 and all dates during the months of January through June occurred during 1997.

witnesses, and to file briefs. Based upon the entire record, upon the briefs which were filed, and upon my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

5 I. Alleged Unfair Labor Practices

A. Introduction

10 This case presents allegations arising from conduct occurring in the wake of a union's efforts to organize employees of an employer. The union is Minnesota Federation of Teachers, herein called the Union, a labor organization within the meaning of Section 2(5) of the Act. The employer is Parents in Community Action, Inc., herein called Respondent. At all material times it has been a non-profit corporation which is the Head Start grantee for Hennepin County, Minnesota and, as such, provides pre-school education and day care for children at seven
15 centers in that county. Its office and principal place of business is located in Minneapolis.

Respondent admits that in the course of its operations during calendar year 1996 it derived gross revenues in excess of \$500,000 and, in addition, purchased products, goods and services valued in excess of \$50,000 which it received in Minneapolis directly from points
20 outside of the State of Minnesota. In its Answers, though, Respondent took the position that it is a political subdivision of that state and, in consequence, is excluded under Section 2(2) of the Act from the definition of "employer". However, during its opening statement Respondent withdrew that defense: "specifically, we withdraw our affirmative defense, that it is a political subdivision of the State of Minnesota, and thus, not an employer within the meaning of Section
25 2[2] of the National Labor Relations Act." Thus, the allegation to that effect is no longer denied and, accordingly, I conclude that at all material times Respondent has been an employer within the meaning of Sections 2(2), (6) and (7) of the Act.

As to the alleged violations of Act, as discussed in succeeding subsections the Union
30 actively initiated its organizing campaign with letters and accompanying authorization cards distributed to employees during early December. The letters announced that employees interested in the Union could attend a meeting from 5:45 to 6:45 p.m. on December 12 at a Minneapolis park's neighborhood center. As described in subsection B and C below, a preponderance of the evidence shows that Respondent learned of that meeting. Before it
35 occurred, Respondent announced an employee meeting, at which attendance was optional, for December 12 from 5:00 to 6:30 p.m. The General Counsel alleges that, in having done so, Respondent had been attempting to interfere with the Union's previously scheduled meeting and, as concluded in Section II, *infra*, that allegation is supported by a preponderance of the credible evidence.

40 At its December 12 meeting Respondent unveiled to employees in attendance its new competency-based assessment and pay program. That program had been in the process of development since the early 1990s. Then, in their paychecks for December 20, all of Respondent's employees received wage increases. At a meeting on January 6, mandatory for
45 all employees who had not attended the December 12 optional meeting, Respondent again presented its competency-based program. Employees had been aware prior to December 12 that such a program was in the process of being developed. But, before that date they had never been informed of its component elements and about how it would operate. The General Counsel does not challenge the program in general. Instead the Complaint focuses on one aspect of it: its asserted sub-classification of all employees hired after January 1, 1994, the majority of Respondent's employees by late 1996, as "trainee/probationary employees." It is alleged that such a sub-classification had been discriminatorily motivated and, consequently, a

violation of Sections 8(a)(3) and (1) of the Act. Furthermore, it is alleged that wage increases which employees received on December 20 had been timed to interfere with, restrain and coerce employees in deciding whether or not to support the Union.

5 As discussed in subsection D and in Section II, *infra*, the evidence does not support the purported “trainee/probationary employees” classification allegation. For, the evidence does not support the argument that, in the competency-based program, Respondent uniformly equated probationary employees with those sub-classified as trainee. Nor does the evidence support the argument that the date January 1, 1994, in connection with those employees who
10 would be sub-classified as trainee, had been one selected hastily upon Respondent’s discovery of the Union’s campaign. Rather, the testimony shows that employees had been aware for some time prior to December 12 that, under the developing competency-based program, employees would be sub-classified as trainee if hired after January 1, 1994, though not necessarily also as probationary employees.

15 In contrast, while Respondent had anticipated since the 1996-1997 school year’s commencement that it would be conferring wage increases upon its employees, there is no evidence that, absent learning of the Union’s campaign, it would have conferred them as early as December 20. In fact, there is no reliable evidence that it would have presented its
20 competency-based assessment and pay program to employees as early as December 12, absent the Union’s appearance on Respondent’s scene. Moreover, as discussed further in Section II, *infra*, a preponderance of the credible evidence does not support the contention that the wage increases had been nothing more than a natural outgrowth of that competency-based program.

25 Instead, it shows that there had been but a tangential relationship between the wage increases conferred on December 20 and the competency-based program. In fact, it appears that the December 12 optional meeting had been conducted as no more than a fig leaf to disguise what, in reality, was advanced conferral of wage increases, eight days later, in an
30 effort to head off possible employee-support for representation before it progressed too far – by “scotch[ing] lawful measures of the employees before they had progressed too far toward fruition,” *NLRB v. Jamestown Sterling Corp.*, 211 F.2d 725, 726 (2nd Cir. 1954), thereby “so extinguish[ing] seeds [that Respondent] would have no need to [later] uproot sprouts.” *Randolph Division, Ethan Allan, Inc. v. NLRB*, 513 F.2d 706, 708 (1st Cir. 1975).

35 It is alleged that Respondent also subsequently did try to “uproot sprouts.” On February 20 it terminated Rose Ryan who had signed an authorization card assertedly under the watchful eye of Center Supervisor Joni Lawrence. As discussed in subsection E and in Section II, *infra*, the motivation for Ryan’s termination presents what turns out to be perhaps the most difficult
40 issue for resolution. There is no credible direct evidence that Respondent knew that she had signed the authorization card. Of course, absence of direct evidence of the analytical element of knowledge does not mean that an inference of knowledge cannot be drawn. As will be seen in subsection E and in Section II, the totality of the evidence presents considerable basis for drawing such an inference. It also provides a considerable basis for drawing an inference of
45 unlawful motivation for Ryan’s termination.

In that respect, one point should be made at the outset. Many witnesses, for both sides, gave testimony that at times appeared to be less than reliable: appeared to be intended more to buttress the side which those witnesses favored, and in one instance to conform to fantacized stereotypes of the witness, rather than being a genuine effort to recreate what had been said or what had occurred. That is not to say that all witnesses appeared to be providing testimony which was uniformly lacking in candor. In fact, most merely fudged at some points, while seemingly testifying with candor for the most part. Nonetheless, it is not possible to say that any given witness, certainly the primary witnesses for each side, appeared always to be testifying so credibly that he/she advanced accounts which can, without reservation, be relied upon in every situation.

There also are allegations that unlawful motivation led Respondent to issue a warning memo, dated January 14, 1997, to head teacher Jan Radder and, then, to discharge him on March 7. As discussed in subsection F below, even if he had committed the infraction with which he was charged on March 7, the official who claimed responsibility for the discharge decision – McKnight Center Director Gretchen Hengemuhle – admitted that she would not have terminated him then, had there not been the January 14 warning memo in his personnel file.

The problem with that warning memo is that Respondent's testimony about it is so internally contradictory, inconsistent among accounts and inconsistent with objective considerations that it simply cannot be concluded that the warning memo had been prepared during January or, even, prior to March 7 – that is, it cannot be concluded that the warning memo had not been prepared hastily on March 7 as a vehicle for shoring up a discharge decision that would not have been made had Radder not been a leading supporter of the Union. Beyond that, as discussed further in Section II, *infra*, the evidence concerning the asserted March 7 infraction is not so straightforward as Respondent attempts to portray it.

A third alleged unlawfully motivated action was the transfer of receptionist/records clerk Brett Feldman from Glendale Center to Fraser Center on April 29. As discussed in subsection G below, the primary testimony in support of that allegation was not advanced reliably. Furthermore, that testimony is at odds with other employee testimony and with objective considerations. As a result, a preponderance of the credible evidence will not support a conclusion that the transfer had been unlawfully motivated.

In addition to the foregoing allegations, there are several alleged statutory supervisors' statements to employees, made from December through June, which assertedly violated Section 8(a)(1) of the Act. Some of those allegations are supported by a preponderance of the credible evidence; others are not. Those which are so supported serve as significant evidence that Respondent did harbor animus toward the concept of unionization of its employees and took measures to thwart it from occurring, as well as to retaliate against a leading supporter of the Union.

B. Initiation of Union Activity

Entering the 1996-1997 school year, Respondent's employees had not received any wage increases for over a year. As that school year began, they expressed concern about that fact to Respondent's center directors and supervisors. Thus, Executive Director Alyce M. Dillon, an admitted statutory supervisor and agent of Respondent, testified that for over a year by Fall of 1996 wage levels had been "an ongoing concern at our agency," and that "there were some employees who asked their supervisors and their center directors, and myself as well ... why weren't they going to get some money, when were they going to get some more money, those kinds of things." An additional source of employee dissatisfaction emerged with

commencement of that school year.

During prior school years, testified Dillon, Respondent had been trying, at least, to maintain a ratio of “a driver assigned to every single classroom and every classroom had their [sic] own driver.” But, it had been difficult to secure and retain a sufficient number of drivers qualified for transporting young children. So, for the 1996-1997 school year Respondent reorganized its transportation component, in effect assigning two classroom to each driver, and saving approximately a quarter of a million dollars. That impacted on teachers in a significant respect.

During previous school years their work schedule had been from 8:30 a.m. to 4:30 p.m. However, cutting back on the numbers of drivers meant that each driver would be making two separate trips during the mornings, bringing two busloads of students to Respondent’s centers, and two separate afternoon trips, each to return a separate busload of students to their homes. Inasmuch as Respondent apparently did not shorten the length of its school days, that meant that some students – those on the first morning bus trips – would be arriving earlier than during prior school years. Further, some students – those on the second set of bus trips home – would be remaining at centers longer than during preceding school years.

To ensure that staff would be available during those added morning and afternoon periods, it is undisputed, Respondent rescheduled head and assistant teachers, and perhaps also other staff, for two daily shifts: one from 7:30 a.m. to 4:00 p.m., the other from 8:00 or 8:30 a.m. to 5:00 p.m. Of course, that effectively meant more overtime work. Therein lay the added source of dissatisfaction among the non-bus driving personnel.

Respondent had never paid overtime premium rates to head and assistant teachers. As to the former, Respondent took the position that they were supervisors within the meaning of the Fair Labor Standards Act.² While it did not contest that assistant teachers were entitled to be paid overtime rates, Respondent had been according them, and seemingly head teachers as well, paid lunches in lieu of overtime pay. It is undisputed that with commencement of the 1996-1997 school year Respondent discontinued that practice, leaving all teachers in the position of receiving no overtime pay while drivers did receive such premium pay based upon what Dillon referred to as “a heavier work load ... that would include overtime[.]” Not only did that dissatisfy Respondent’s teachers, but their dissatisfaction was brought to Respondent’s attention through two sequences of events.

The first involved McKnight head teacher Merrilene Jensen. She initiated inquiry of the United States Department of Labor, Employment Standards Administration, Wage and Hour Division about, at least, overtime pay requirements. In fact, while the matter is somewhat obscure based upon the evidence adduced, that agency apparently commenced an investigation of Respondent’s pay practices. Of itself, that investigation is not of particular concern to the issues posed in this proceeding. Nevertheless, it must have served as notice to Respondent of dissatisfaction among its employees about the no-overtime pay practice. In connection with that situation, events also occurred which demonstrate that information circulates fairly freely among Respondent’s employees.

As to that point, Jensen obtained two Wage and Hour Division publications concerning overtime compensation. In addition, she obtained copies of Respondent’s “Financial Information,” in effect annual reports, for its fiscal years ending June 30 of 1993, 1994 and

² Obviously, I make no resolution on the correctness of that position under a statute other than the Act.

1995. Word of Jensen's procurement of those items got around McKnight Center. She testified that "more people kept asking for" copies of those documents and, in consequence, she did photocopy them, albeit sometimes incompletely, and provide those copies to her coworkers. According to Jensen, she may have distributed as many as twenty copies of government publications and "[a]bout ten" copies of the "Financial Information" documents.

The second sequence of events involved certain McKnight Center teachers other than Jensen. Alleged discriminatee Jan Radder, at the time a head teacher at that center, testified that, "Starting at the end of September and [continuing] through October and November, " after the children had left for the day, a group of that center's 100 Wing teachers "would meet in one of the classrooms and we discussed the fact that we weren't getting overtime and what we could do about it." At first they were meeting "[a]bout once a week," he testified, but beginning during late October, in light of events discussed below, they began meeting "sometimes twice" a week.

As to what they had been discussing at those meetings, Radder testified that, in addition to the overtime pay issue, they began talking about "lots of various issues," such as "that we weren't receiving respect in our jobs, that we didn't have any say in what we were doing, that we hadn't received raises." Even so, the overtime issue remained their primary subject of discussion.

An employee other than Radder began circulating for employees' signature a document, dated "October 10, 1996," addressed to Respondent's executive director, directors of operations, center directors and center supervisors. Its text states that "the undersigned respectfully refuse to attend night functions other than P. A. C. meetings, unless we are offered the same overtime opportunities as the Transportation component, or until an all staff meeting can be held with Administration to answer our questions about current changes in our program." Approximately 40 signatures appear below that text, including that of Radder.

There is no direct evidence – evidence which "if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption." *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir. 1989) – that a copy of that document had been received by then-McKnight Center Director Phyllis Sloan, an admitted statutory supervisor and agent of Respondent during the period when she had served in that capacity. However, by one-page "MEMO" dated "October 15, 1996," addressed to McKnight and South Branch Centers staff, Sloan addressed the subject of "Compensation Questions."

Her memo recited positions which Respondent regards as "Exempt", including that of "Head Teacher," and those which it considers "Non-Exempt," including that of "Teacher Assistant". The memo invites employees to "contact me to set up an individual meeting if you have any particular questions about your job or status so that you may receive all appropriate information." Below that statement appears two statements, each preceded by a blank on which an "X" or check mark could be placed. Employees are invited to "Choose only one:" The first choice states that "further clarification" is not necessary; the second states, "If you need further clarification regarding Daily Activity Logs, compensation including overtime and Exempt and Non-Exempt Status, place a check at the beginning of this sentence, sign below and return."

It seems difficult to conclude that Sloan's October 15 memo had been other than a response to the employees' October 10 document. In fact, as the hearing progressed Respondent appears to have acknowledged as much.

Given the allegation that conferral of December raises had been unlawful, testimony by Jensen and Radder concerning certain remarks by Sloan must be reviewed. In that connection, when she appeared as a witness for Respondent, Sloan did not contest any aspect of those two head teachers' description of her remarks. Even so, there were inconsistencies between the accounts of Jensen and Radder about what Sloan had said.

Jensen described a conversation with Sloan after October 10. She could not recall "the exact date" of that conversation, but testified that she had signed a copy of Sloan's above-described October 15 memo "a while after" that conversation with Sloan. Jensen further testified "I don't believe" that the conversation with Sloan had been in response to a third document, one dated "October 21, 1996," described below. Thus, it is a fair inference that the Jensen-Sloan exchange had taken place at some point between October 10 and 21, shortly before or after Sloan issued her October 15 memo. Significantly, Respondent never produced the copy of Sloan's October 15 "MEMO" which Jensen had signed, though there was no claim that it had been destroyed or was otherwise unavailable for production.

With regard to the substance of their conversation, Jensen testified that she and Sloan had been talking in the hallway about exempt employees not receiving overtime pay and non-exempt employees being qualified to receive, but not receiving, it "because we use comp time." Other employees began gathering around – one of who was Radder – and some of them began asking questions. When those questions began to relate to individual situations, testified Jensen, Sloan said that "she was not going to have a meeting about this. If anybody had any concerns or questions about this she would discuss it with them one on one." As will be seen, it is important to notice that Jensen gave no testimony, in connection with this conversation with Sloan, about discussion of wage increases. Nor did she mention that there had been specific discussion concerning Sloan's October 15 "MEMO." Finally, Jensen did not describe any other hallway conversation with Sloan in which she (Jensen) had participated during the Fall of 1996.

As to Radder's essentially split-account, he testified at one point that he had been among "a group of teachers as [Sloan] was handing out the" October 15 memo and, further, that as she had done so, Sloan had been "a little hostile. She got a little angry, which was unusual for her." Asked about overtime pay, testified Radder, Sloan "said that head teachers were not entitled to overtime because we were supervisors, she said we had degrees and ... supervised the assistants and were responsible for everything that went on in the [class]room," and, in response to additional questioning from assistant teachers and parent- child advocates,³ "that the reason why drivers were getting overtime this year is because they are doing more work ... driving two routes as opposed to one and therefore that's why they were being given the overtime." According to Radder, Sloan also "said assistants and advocates were entitled to overtime pay but they were not going to receive overtime pay even if they worked overtime, they would instead have to take comp time." Radder further testified that Sloan had said "that the purpose of the memo was to determine whether or not there was enough employees who were still unclear and whether or not to hold a large meeting."

At another point during direct examination Radder described a conversation with Sloan about the possibility of wage increases. Initially he testified, "I think it was, November," but then he modified that answer by testifying "it may have been when we -- on October 16th when we were given the memos telling us about our exempt status." According to Radder, "At the same time we had been told that Congress had given the Head Start program all the money that Clinton had asked for," and, "I think it was Merl [Jensen] who asked, does this mean that we'll

³ Essentially personnel assigned to assess and work to fulfill family needs, including teaching parents how to advocate on behalf of themselves and their children.

be able to get raises this year because there's more money for Head Start?" Radder testified that, to Jensen's question, Sloan had responded, "no, we won't be getting any raises even though there is going to be more money, and the reason for that was that none of the Head Start money had been earmarked for raises, and that it had to be earmarked for raises in order to give us those raises."

As mentioned in subsection A above, Respondent did give all employees raises in their December 20 paychecks. As discussed in greater detail in subsection D and in Section II, *infra*, it contends that it had planned since the school year's commencement to confer wage increases on its employees. Of course, Radder's unrefuted account of Sloan's asserted October statements about no raises would represent evidence tending to undermine that contention. But, as pointed out above, while Jensen placed Radder as having been present during her lone described account of a Fall hallway conversation with Sloan and other employees, Jensen made no mention whatsoever of possible wage increases having been discussed at that time. Neither, during that conversation – nor during any other conversation, for that matter – did Jensen assert that she had raised the subject of raises with Sloan. And, while Radder claimed that other employees also had been present when Sloan said that increases were not planned for employees from the Head Start increased funding, no other employee gave testimony that Sloan had made the statements described by Radder.

Moving on, despite the options stated at the bottom of her October 15 memo and despite the evidence that at least two employees had checked the option requesting a meeting with her, Sloan never did conduct an individual meeting with any of McKnight Center's employees, so far as the record discloses. Radder agreed that he became "agitated" when almost a week passed without receiving a response from Sloan. He also testified that, during the ongoing after-school classroom meetings, other employees expressed concern about the lack of a response from Sloan. So, three of them decided to send another communication to Sloan. Afterward, a fourth employee agreed with that decision. Thus, utilizing the computer in McKnight Center's advocates office, as he ordinarily did in the course of his daily activities, Radder prepared a communication to Sloan, dated October 21, 1996. Its text states: "We are requesting a meeting with you at your earliest convenience regarding the recent exempt/non-exempt employee memo. Since its distribution there have been some questions which have arisen which we are hoping you can help to clear up." Appearing on that communication are the names of Radder, Jensen, Amy Timander and Crystal Abdullah, all teachers.

It is uncontroverted that Sloan did not respond to the four employees' effort to communicate with her. No direct evidence exists that she actually had received and read their communication. Neither, however, did Sloan deny that she had received that communication from the four employees. Radder testified that he had placed it in her staff mail box at McKnight Center, as he ordinarily does with other matters that he wanted to provide to Sloan. "A letter properly addressed and mailed is presumed to have been delivered to the addressee." (Citation omitted.) *In Re Hairopoulos*, 118 F.3d 1240, 1244 (8th Cir. 1997). True, the four-employee communication to Sloan was not deposited with the United States Postal Service. Even so, no reason is advanced or suggested to support a contrary conclusion regarding items

deposited in a company's internal mail system – especially when there is no denial by the addressee that it was not received.

Radder testified that, as time passed without any response from Sloan, the after-hours employee-group meetings began to be conducted more frequently. During those meetings, he testified, the employees continued talking about “the overtime issue, but we were also taking about issues such as pay raises, disparate treatment of staff, the fact that we didn't have any say in our jobs,” and their perception that they “didn't think that supervisors gave us the respect that we deserved,” with Sloan's nonresponses seemingly serving to illustrate that perception. They began considering retaining counsel but, testified Radder, while such an approach “might solve the overtime issue, ... it would leave all these other issues unresolved and so I brought ... up the issue of possibly contacting a union because a union could help resolve these other issues, and ... we all decided that we should contact a union.”

Radder volunteered to pursue such a course. Eventually he made contact with the Union. He initially spoke by telephone with Staff Representative Sara Gjerdrum who, in effect, told him to confer with the other employees in his group and come up with dates when they would be available to meet with her. November 19 was selected. Radder and two other employees met with Gjerdrum. She explained objectives of an organizing campaign and said that they should enlist coworkers so that the core group of union supporters would be larger. The three employees pursued that course. Another meeting with Gjerdrum was arranged for Monday, December 2.

Eight employees were invited to attend that meeting. Only Radder and three others, one of whom was Jensen, attended it. During the meeting a decision was made to convene a general meeting with so many of Respondent's employees as were willing to attend. Thursday, December 12 was selected as the date for that meeting. Gjerdrum said that she would prepare a flyer, giving notice of that meeting, which could be distributed to Respondent's employees. On Wednesday, December 4 Radder picked up approximately 200 flyers, each of which was accompanied by a card which recipients could sign to authorize representation by the Union.

One aspect of the flyer is significant, given the allegation that Respondent then scheduled its own meeting with employees to interfere with the December 12 meeting already scheduled by the Union. Among other statements, the flyer recites:

In order to proceed, it is important that you sign the card and return it by **Thursday, December 12**. You can either return the card to the person who gave it to you, or you can bring it with you to an informational meeting. The meeting will be at: **McRae Park Neighborhood center** (906 East 47th Street/47th & Elliott) **Thursday, December 12, 5:45-6:45 p.m.**

Between December 2 and 4, testified Radder, employees who had attended the December 2 meeting with Gjerdrum asked coworkers if they would distribute the flyers and accompanying authorization cards.

Upon receiving those materials, Radder grouped them for distribution to centers other than McKnight and, for McKnight Center, grouped the materials by wing and, in addition, for drivers and advocates. He then disseminated the groups for subsequent individual

distribution. Entering the sequence of events at this point is Glendale Center receptionist/ records clerk Brett Feldman, another alleged discriminatee in this proceeding.

Radder testified that he had created a grouping of flyers and authorization cards for distribution at Glendale Center. But, neither he nor Jensen testified to having located, or even tried to locate, someone there who would distribute those materials. Feldman testified that when he had arrived for work on Wednesday, December 4 or on Thursday, December 5 he discovered a stack of flyers and cards which someone had placed "by the computer" at "my work station." Though he inquired, no one told him who had placed those items there. After reading over the flyer and doing some weekend reading about unions, Feldman testified that he undertook distribution of flyers and attempted to solicit signatures on authorization cards. He further testified that he also "had called over to the Northeast Center trying to recruit people."

None of these three employees – Radder, Jensen, Feldman – testified to have been actually observed by supervisors talking to coworkers about the Union, its authorization cards and the December 12 meeting. Indeed, Radder agreed that he had tried to keep his union activities secret and hidden from Respondent. Still, Feldman recounted a conversation with Glendale Center Director Marilyn Hockert during mid-December in which, he claimed, she informed him that Northeast Center Director Gretchen Hengemuhle, both of whom are admitted statutory supervisors and agents of Respondent, "had accused him of calling the Northeast Center and talking to her people." There is no question that a conversation about Hengemuhle did occur between Feldman and Hockert. But, while Feldman claimed that Hockert had been the one who said that Hengemuhle had told her that Feldman was contacting Northeast Center employees, Hockert testified that it had been Feldman who had said "that Gretchen Hengemuhle had accused him of calling the Northeast Center and talking to her people."

In neither of their conflicting accounts did either Feldman or Hockert claim that the former had admitted to having contacted Northeast Center employees, or employees at any of Respondent's other centers, on behalf of the Union. Hockert testified that Feldman said that he had not done so; Feldman testified that he had made no response to what Hockert assertedly had said to him. Furthermore, Hockert, though not Hengemuhle, denied having spoken with Hengemuhle about Feldman contacting employees at Northeast Center. It also is significant that Feldman acknowledged that he had initiated conversations with Hockert, whom he regarded as a friend, about union issues and, in fact, had wanted to talk with Hockert about such issues.

It is clear, despite efforts to keep union activity guarded from Respondent, that those activities soon became known to Respondent's executive director. By "MEMO" to "All Staff," dated December 6 and "RE: Union Organizing," Dillon gave notice that, "I have been informed that a group of PICA employees will seek to organize you to form a union." That memo invites Respondent's employees to ask that group of employees "what new or additional benefits you might receive by joining," and, further, "to explore this option more carefully" by asking some or all of a series of questions enumerated in a four-page "series of questions that you may want to ask," attached to her memo. There is no allegation that Dillon's memo or the attached four pages of questions violated the Act. Nonetheless, they are direct evidence that Respondent had acquired knowledge of the Union's organizing campaign within two days of Gjerdrum's distribution to Radder of the Union's flyers and accompanying authorization cards.

Further significance to Dillon's memo and its attached pages of questions arises in connection with her testimony regarding how she had come to learn about the Union's campaign. Asked to explain how her memo and questions came to be distributed on December 6, Dillon testified, relatively specifically, that she had drafted the material about five years earlier, in connection with a campaign by United Auto Workers to organize Respondent's staff: "I happen to be actually a long time union supporter, come from a family -- my father was a union organizer. Both of my sons were union people and I just felt that it was important that people fully understand exactly which kind of a decision they were making, which, if any, union were [sic] going to represent them would be the best union to represent them." As a result, testified Dillon, during 1996 she had "just sort of had Leslie pull it from the file and resurrected it," by changing no more than the date and, then, having the material re-issued.

In contrast to that relatively specific account, Dillon became more vague when questioned about the information that she received and which had led her to have Leslie "pull" the memo and attached questions. Dillon testified, "I don't know," when asked how she had become aware of the Union's campaign at Respondent. She then added only, "Just at a staff meeting of, you know, executive team members. I don't remember specifically." That is a somewhat breathtaking answer. After all, she had viewed the report of unionization as being so significant that she had existing material pulled from the files, updated and distributed to Respondent's employees. Those actions obviously demonstrate that, at the time, she had regarded the Union's campaign as being an important event. In such circumstances, as an objective matter, a claimed lack of recollection, about who had told her about the Union's campaign and what had been said at the time about that campaign, is quite suspect and, indeed, inherently calls into question the reliability of Dillon's accompanying denials that she had known prior to December 12 about the Union's scheduled meeting on that date.

It is a fair inference in the circumstances that Dillon had learned about the Union's campaign from having seen the very flyer which announced a Union meeting with Respondent's employees on that date. There is no evidence that any of Respondent's supervisors or agents had observed employees distributing those flyers. Dillon never identified any one of the "executive team members" present at the "staff meeting" where she claimed to feel that information about the organizing campaign had been communicated to her. Nor, when testifying, was she seemingly making any effort to try to recall what had been said to her at that purported meeting about the emergence of the Union's campaign at Respondent. No other witness appeared for Respondent -- no "executive team member[]" -- who acknowledged that such a "staff meeting" report to Dillon had been made and to explain specifically what had been said to her about the Union and its campaign, as well as about the source of such information. By the time that Dillon testified, she was well aware that Respondent's scheduling of its own December 12 meeting was a subject of an unfair labor practice allegation. In the totality of those circumstances, it is a fair inference that Dillon was not being fully candid about the source of her information concerning the Union's campaign, that she had seen or, at least, heard about the flyer and its contents, and that she was trying to put some distance between the meeting announced in that flyer and her knowledge about it.

C. Respondent Schedules Its Own December 12 Meeting

A conclusion that Dillon had been aware of the Union's December 12 meeting, when scheduling Respondent's own meeting on that date, is reinforced by Respondent's evidence concerning the decision to hold a meeting on December 12. Distributed to all of Respondent's employees was an "**! ANNOUNCEMENT !**" about a "Meeting for all interested staff" to be conducted on "Thursday, December 12," from "5:00-6:30 PM" at Fraser Center, "To learn more about the new Competency-based Pay Program at PICA." In smaller type below appears the

legend: "Find out how it might be possible to increase your wages." At the leaflet's bottom is stated, "This meeting is **OPTIONAL!**"

Of course, December 12 was also the date announced for the Union's meeting, from 5:45-6:45 p.m. at McRae Park. From the testimony presented, it would take from 20 to 30 minutes to travel from Fraser Center to McRae Park during rush hour. Thus, were one to attend Respondent's meeting that day, and not walk out in the middle of it, one would be effectively precluded from attending the Union's meeting. Still, the question remains as to whether Respondent had scheduled its meeting only after having learned about the Union's meeting.

Asked how the "**! ANNOUNCEMENT !**" had been distributed, Dillon answered, "I believe it was distributed to staff by the center directors. I can't quite -- frankly I can't remember how it was distributed to the staff." Asked if it had been distributed after her December 6 "All Staff" memo, Dillon claimed that she could not answer that question: "I don't know. There is not a date on it and I don't recall." No other witness for Respondent supplied a date of preparation for the "**! ANNOUNCEMENT !**"

With respect to selection of December 12 for Respondent's meeting, more specific testimony was elicited from Ann Thunder, Respondent's finance director. She described a meeting at which center and component directors were informed about "the final figures for specific [wage] increases [which] were in place for that meeting," a subject discussed further in the succeeding subsection. It had been at that meeting, testified Thunder, that December 12 had been chosen as the date for the optional meeting with employees.

At first, Thunder testified generally that the meeting with directors had occurred during early December. Pressed for an estimate of how far that meeting had been conducted prior to December 12, she answered, "It was only like three or four days." Of course, that would mean, at earliest, that the meeting with directors had occurred on Sunday, December 8. Setting aside the question of whether Respondent's management likely would have met on a weekend day, Thunder's testimony shows that the decision to conduct the optional meeting, as well as the announcement of it to employees, had not occurred until after Dillon had issued her December 6 "RE: Union Organizing" memo of December 6 and, as concluded in subsection B above, after Respondent had become aware of the Union's scheduled December 12 meeting.

That conclusion is further supported by the testimony of Feldman and Jensen. He testified that he had received the "**! ANNOUNCEMENT !**" on either Friday, December 6 or on Monday, December 9. Either alternative, of course, would mean that Respondent had known about the Union's meeting by the date of its "**! ANNOUNCEMENT !**" That the latter date is more likely the accurate one is shown by Thunder's above-described testimony concerning the center and component directors' meeting. It also is shown by Jensen's testimony. For, she testified that she had received the "**! ANNOUNCEMENT !**" on Monday, December 9. To be sure, she allowed during cross-examination that she could have received it "December 7 but I would say no, no earlier than that."

Unexplained in connection with that answer during cross-examination was why Jensen would have been at McKnight Center on a Saturday, a non-school day, which is when the 7th fell during December of 1996. So far as Respondent's Staff Master Calendar shows, the only event scheduled for that day was a "Mandatory New Staff CPR Training," starting at 8:30 a.m. But, that occurred at Park Place, not McKnight, Center. Moreover, as discussed further in subsection E below and as shown by the wording of that quoted phrase on the Staff Master

Calendar, the CPR training was being provided for newly hired employees. Jensen hardly fit within that description, inasmuch as she had been working full time for Respondent since the 1993-1994 school year.

5 In sum, a preponderance of the evidence supports the conclusion that Respondent's announcement of its December 12 meeting, and the underlying decision to conduct it, had not occurred until after its officials had learned that the Union was attempting to organize its employees. Of course, that still leaves for consideration the basis for its decision to conduct that meeting on December 12, late in the day.

10 At one point Thunder referred to that date as having been "pretty much the drop dead date" – one on which such a meeting had to be conducted if an optional meeting with employees was to be conducted before December 20, the last school day before winter break:

15 I think if we could do it then we were probably going to wait until the holiday break was over because we were running very close to our two week break, what we call our winter break, and I think the center directors had indicated that, you know, if you don't do it on that date then, you know, it's probably not going to happen.

20 Eventually, Thunder testified, "It was my understanding that, you know, the center directors pretty much decided on that day." However, that testimony was not corroborated by any center director.

25 Called as an adverse witness by the General Counsel, and asked why a decision had been made to convene an optional meeting with employees on December 12, Dillon first failed to give a direct answer: "Well, we had been working on the competencies for several years and we'd been working on the pay scale since approximately August." Then, asked if she was saying that the December 12 meeting had been scheduled during August, Dillon responded, "I -
30 - no, it wasn't in August but it was probably in November or December. I can't give you the exact date." When the question again was put to her, Dillon answered, "I can't answer that question. I don't know. It's important for you to understand that this particular time of year is the busiest time of year and we have numerous meetings and events."

35 Examined by Respondent's counsel, Dillon again was interrogated about selection of December 12 as the date for the optional employee meeting. At that point, she testified that , during conversation with her staff, "that was one of the available times based on the current schedule of evening events at that particular time so that that was a good date," and that her conversation with staff, "probably took place fairly close to December 12th," but she testified that she could not say how close. Of course, that removes November altogether from having
40 been the possible month when December 12 was selected as the date for the optional meeting. Moreover, it tends to show that the selection, in fact, had occurred after Dillon had learned about the Union's campaign. Even so, when the subject of December 12 was raised initially by Counsel, Dillon claimed "I don't recall specifically" if December 12 had been mentioned during her conversation with her staff.

45 One problem with Dillon's account, and to some extent that of Thunder, is that, according to Respondent's Staff Master Calendar, December 12 was seemingly not an open date for, at least, center directors. For, the calendar shows a "Center Committee, VIP Committee & Male Involvement Event" scheduled for 6:00 p.m. on December 12 at Glendale Center. The question of whether center directors likely would have been involved in such a meeting was put to Thunder during cross-examination. She responded, "Um -- I don't know. Actually I don't. I honestly don't know." But, during redirect examination, she allowed that it

“would be my assumption” that all center committees and all members of center committees would be meeting at that time. No witness claimed that center directors were not members of center committees. Therefore, if one is to credit any testimony that December 12 had been selected by center directors as the date for the optional meeting with employees, that would mean that they had chosen to conduct that meeting at a date and during times which partially
 5 conflicted with an already scheduled meeting which they were obliged to attend – and at a center different from the one where center committees would be meeting.

It was not as if other open evenings did not exist between December 8 and 18. To be
 10 sure, as both Dillon and Thunder testified – as well as anyone else questioned about the subject – December is Respondent’s busiest month. Yet, based upon the Staff Master Calendar for that month, no evening, nor even daytime events, were scheduled for Wednesday, December 11; for Friday, December 12; for Tuesday, December 17; nor, for Wednesday,
 15 December 18. Certainly any one of those dates would seemingly have presented center directors with no conflicting commitments. However, neither Dillon nor Thunder bothered to explain why one of them had not been considered as an alternative to December 12.

Both the Union and Respondent conducted December 12 meetings. As pointed out in subsection A above, Respondent unveiled its competency based assessment and pay program
 20 on January 6 for employees who had not attended its December 12 meeting. The substance of what had been said to employees at those two meetings is reviewed in the succeeding subsection. However, this may be a good point at which to review the competency-based program, at least to the extent necessary to evaluate what had been said about it at those meetings and, as well, the allegation arising from that program’s presentation to employees.

Development of the program, oft times referred to as PICA-Pedia, had been underway for almost the entirety of the 1990s, under the guidance of Jeanine Marchessault, Respondent’s
 25 director of education and disability services since 1991. There appears to be no dispute about the fact that she is the official most familiar with the program, though other officials have been involved in developing it and are also conversant with its operation. Over the course of
 30 developing the program, Marchessault had spoken with staff members, participated in meetings, formed focus groups, written pilot programs, trained staff and conducted some trial assessments during the Spring of 1995. As will be seen, that latter activity becomes significant in considering the allegation that unlawfully relegated to the status of trainee had been all
 35 employees hired after January 1, 1994, as discussed in the next subsection.

Respondent categorizes its employees as operations staff and support staff, based upon whether or not staff ordinarily have contact with students. Thus, operations staff includes
 40 head teachers, assistant teachers, drivers, advocates, nutrition worker and nutrition assistants. Support staff includes those who are janitors, engineers, records clerks, receptionists, secretaries, component assistants, male involvement specialists, interpreters, finance and personnel staff.

Dillon seemed to be claiming, at least at some points, that the competency-based assessment and pay program extended to both operations and support staff: "I think it's important to understand that education services isn't just specifically for those people who work in the education component as in teachers. All staff are required to do some of the things that are in the [PICA-Pedia] education volume. It's interdisciplinary." But, to the extent that Dillon may have been claiming that it was contemplated that the competency-based program would apply to support staff, her claim is at odds with Marchessault's description of that program: "we were not looking at support staff to ever develop the PICA-Pedia system. They are not part of it and they to this day are not part of it, the support staff." "We have written a PICA-Pedia for clericals," she added, "but we do not have at this time and we've never had in our discussions that they would be part of this system." That point will also become significant in connection with the succeeding subsection's description of the wage increases conferred on December 20.

As to the program's operation, to the extent pertinent, operations staff are job-classified in one or another of the six job classifications enumerated two paragraphs above. What are called "competencies" have been formulated within each of those job classifications: what Marchessault described as "all the expectations, ... basic information" for progress through subclassifications, or competency classifications, within each one of those six job classifications. Thus, within each of those job classifications – head teacher, assistant teacher, driver, advocate, nutrition worker, nutrition assistant – employees ideally progress from "entry" to "trainee" to "apprentice" to "journey" to "mentor," as they acquire more knowledge and experience within their job classifications. That is, the program is based upon progressively demonstrating "their knowledge, skill [and] ability," as Marchessault put it.

She further explained that "all the expectations, ... basic information" for each subclassification or competency classification in every job classification were formulated in developing the competency-based program. They are set out in ring binders, the PICA-Pedia volumes. Thus, an operations employee in a particular competency classification can determine what objectives need to be accomplished and demonstrated to advance within job classification. So, also, can Respondent and, in fact, that is the plan. Through periodic assessments, employee performance in each competency classification is evaluated. If, for example, an apprentice head teacher is assessed as proficient in all respects for that competency classification, then she/he becomes eligible to advance to that of journey head teacher. Should that occur, then that head teacher's wage rate increases. Specific, progressively greater hourly wage rates accompany each of the subclassifications or competency classifications for all job classifications.

Should an employee succeed in obtaining a transfer to another job classification – from assistant teacher to head teacher, for example, or from driver to assistant teacher – that employee starts anew through the subclassification or competency classification process for the new job classification. By way of illustration, an assistant teacher subclassified as mentor would begin at the "entry" level upon becoming a head teacher, then be eligible to advance through successive competency classifications – trainee, apprentice, journey, mentor – as a head teacher, if assessed satisfactorily in each succeeding subclassification. Should an "entry" competency classified employee not achieve a satisfactory assessment, that employee would be returned to her/his previous job classification, so long as there was an opening. If not, that employee is terminated.

Totally apart from the competency-based assessment and pay program, Respondent always, so far as the record discloses, has had personnel classifications of probationary and regular. A probationary employee is a newly hired one. Probationary status lasts for one year and, to the extent pertinent here, during that time an employee can be terminated without

recourse to Respondent's grievance procedure. Successful completion of the probationary year leads to re-classification as a regular employee. Historically, a change in job classification – driver to advocate or nutrition assistant to nutrition worker, for instance – would not restart anew the personnel classification. Rather, such an employee would remain personnel-
 5 classified as a regular employee. That also becomes a significant point during the succeeding subsection's discussion.

Before moving to review of the evidence concerning the substance of the December 12 and January 6 meetings, and to that pertaining to the December 20 wage increases, two
 10 conversations should be examined. Each appears to have occurred between Respondent's two meetings. Each also is the subject of an allegation that, by some of what its statutory supervisors had said, Respondent violated Section 8(a)(1) of the Act.

The first involves another conversation between Receptionist/records clerk Feldman and
 15 Glendale Center Director Hockert. During it, Hockert allegedly prohibited Feldman from discussing the Union at work. Thrice Feldman asserted generally that, during the approximately last day before Winter break, Hockert had told him not to discuss the Union at work. But, he also conceded that she had never actually prohibited him from talking about the Union at work. As to the words actually spoken by Hockert, Feldman testified "she just kind of
 20 told me to just stay out of trouble. You know, don't -- don't get involved and not to talk about the [U]nion at work whatever I do" – in other words, he explained, "just to be careful to keep your nose clean."

Hockert denied expressly that she had ever placed restrictions on Feldman's, or any
 25 other employee's, movements around Glendale Center. She did complain that, since having become Glendale Center director during February of 1996, there had been "many a times [sic] Brett was away from the phones and I had to ask him to get back to the phones." "I had to tell him, Brett you need to stay at the front desk," she testified. By way of apparent illustration, Hockert described a particular incident, "probably in the winter," when she had arrived at work and discovered Feldman, teachers and a cook engaged in conversation, with some standing in
 30 the hallway and others standing in the staff lounge. According to Hockert, she had told the teachers "it was time for children" and had told Feldman "to get back to the phones."

That testimony by Hockert is unrefuted. But, of course, occurrence of such instances,
 35 and of her directions to Feldman in connection with them, does not inherently contradict his above-quoted account of what Hockert had said to him on approximately the final day before Winter break.

As to that, Hockert denied having participated in conversations with Feldman about the
 40 Union. However, she allowed that "Brett talked to me about the [U]nion," and that he had done so frequently. She testified initially that, when that had occurred, "I just let Brett talk most of the time" and "I never said anything about the [U]nion." Nevertheless, she then testified that on one occasion when told by Feldman "that there was a movement for the [U]nion and they were organizing," she "had mentioned to him that -- what I knew about unions. That my husband
 45 was in the union in printing, and that I didn't know too much about unions."

Asked later if she recalled having made to Feldman any other references to unions or to union activity, Hockert answered merely "No," thereby leaving uncertain whether she was

saying that she had not actually done so or, alternatively, that she did not recall whether or not she had done so. The distinction is not insignificant.

A lack of recollection answer “hardly qualifies as a refutation of ... positive testimony and unquestionably [is] not enough to create an issue of fact between” witnesses. *Roadway Express, Inc. v. NLRB*, 647 F.2d 415, 425 (4th Cir. 1981). See also, *Shelby Mem. Hospital Association v. NLRB*, ___ F.3d ___, 143 LRRM 3062 (7th Cir. 1993) and *Indian Hills Care Center*, 321 NLRB 144, 150 (1996). As to the other alternative, Hockert at no point denied with particularity the above-quoted statements attributed to her by Feldman. In consequence, the record is left with her general denial about having conversations with Feldman about the Union, one later partially contradicted by Hockert’s own testimony, and with her denial of recollection about having made to Feldman any references to unions or union activities, other than the one which she admitted having made to him about her husband.

A general or unclear or blanket denial does not suffice to create an issue of fact. See, e.g., *Mastercraft Casket Co. v. NLRB*, ___ F.3d ___, 132 NLRB 2030 (8th Cir. 1989) (relying upon *Beaird-Poulan Div., Emerson Elec. Co. v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981).) See also, *Williams Motor Transfer*, 284 NLRB 1496, 1496 (1987) (concerning statements attributed to Barquin.) Under either of the foregoing alternatives, Hockert’s testimony did not include a direct denial of the pre-Winter break remarks attributed to her by Feldman, *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 70-71 (4th Cir. 1996), as would be necessary to conclude that his testimony about them is contradicted. Nonetheless, as discussed in Section II, *infra*, lack of adequate denial is not rigidly determinative of the ultimate question of whether Hockert actually had made the above-quoted remarks attributed to her by Feldman. Nor, if made, does that resolve the issue of whether those remarks violated Section 8(a)(1) of the Act.

The second conversation involves statements attributed to McKnight Center Supervisor Charles Davis, an admitted statutory supervisor and an undenied agent of Respondent within the meaning of Section 2(13) of the Act. It is alleged that, during December, he had coercively interrogated Michelle Knox, an assistant teacher at that center, and, in addition, threatened that benefits and working conditions would deteriorate if the Union became the representative of Respondent’s employees.

Both Knox and Davis agreed that there had been a conversation between them, although it may have occurred in early January, rather than during the preceding December. Both also agreed that it had occurred after Radder had spoken to Knox, attempting to persuade her to support the Union. Davis acknowledged having seen that conversation between Knox and Radder.

According to Knox, after Radder had left, Davis “called me over to him” and inquired what she and Radder had talked about and, also, was Radder “talking that union stuff to you,” adding that he “heard that Jan has been trying to go around to get people to join a union.” Knox testified that when she answered that Radder had been speaking to her about joining the Union, Davis “asked me did I sign a card,” and she replied that she had not done so because she wanted to find out more about the union from her head teacher, Patricia Bickham. She further testified that Davis said that she should not sign a card for the Union because unionization would mean no paid holidays, an end to parents being trained and becoming assistant teachers without teaching degrees or certificates, elimination of year-end personal and sick leave, and a need for employees to punch a time clock.

In contrast to what occurred regarding Hockert’s failure to deny the above-described comments attributed to her by Feldman, Davis did deny with particularity most of the allegedly

unlawful statements attributed to him by Knox. Thus, he denied having called her to come over after Radder had left. He denied having told her there would be no paid holidays if the Union came in. He denied having told her that there would be no personal or sick days if the Union came in. He testified that "I never stated" that if the Union came in assistant teachers would be replaced by professional teachers.

As to her accounts of the asserted interrogative portions of their conversation, Davis testified that, after Knox and Radder had parted in the hallway, she had approached him and she had volunteered that Radder wanted her to join the Union. According to Davis, Knox then questioned him: "if the [U]nion came in would the head teachers be moved to the assistant teachers if they didn't have a degree, and would some of their medical benefits and time -- would they have to punch a time clock and some other questions." Davis testified that he had replied "that I did not know," and Knox inquired if he "thought that the [U]nion was a good thing for her," to which he responded "that she would have to investigate that herself as it didn't affect -- it didn't affect my life, or my family's life, so she would have to [do] what was best for her and her family."

As an objective matter, the relationship between Knox and Davis had been a relatively close one. She admitted that they had talked about many things at work. Of course, that relationship objectively cuts both ways -- makes it as likely that he would have asked her about what Radder had said, as that she had approached him to inquire about the consequences of unionization of Respondent's employees. Aside from that, it is undeniable that Knox had been a close friend of Rose Ryan who, as pointed out in subsection A above, would be fired on February 20. Davis opined that because of their relationship and Ryan's eventual discharge, he felt that Knox might be disposed to fabricate testimony adverse to Respondent and, especially, to him.

Knox appeared as a witness before Davis was called to testify. And she was never asked, on cross-examination, about whether her testimony was influenced by the termination of Ryan. As a result, she was never afforded an opportunity to admit or deny that Ryan's discharge was influencing her testimony before extrinsic evidence, the opinion of Davis, was offered. In contrast, she was offered the opportunity to admit or deny that she had asked Davis for his opinion about the Union. She denied expressly that she had done so.

D. Respondent's Meetings and December Wage Increase

Prior to December 12 Respondent's employees had been aware that some form of what became the competency-based assessment and pay program was in the process of being developed. But not until that date were they informed about all aspects of that program and how it would operate. Dillon made the presentation at the December 12 optional meeting. An essentially identical presentation, so far as the evidence discloses, was made at the January 6 mandatory meeting by Lee Ann Murphy, Respondent's director of administration.

Director of Education and Disability Services Marchessault testified that during the Summer and Fall of 1996 "my job was to continue to finish" the competency-based program. She acknowledged that she had not finished writing it until after the December 12 meeting had been conducted: "during the winter break -- I suppose it's '96 and '97 -- during that winter break I did the final editing ready to go to the printers," though there remained to be accomplished publication in the Federal Register of "the performance standards that will go into effect January 1, 1998." "In the spring of 1997 we actually unveiled the final revision," she testified. Significantly, though the official most conversant with the competency-based program, Marchessault already had been scheduled to attend a function in Washington, D.C. during the

week when the December 12 optional meeting was conducted. Thus, she was not present when the competency-based program was explained to employees who attended it.

Before addressing the subject of what had been said by Dillon and by Murphy, during the optional and mandatory meetings, a couple of other points should be made. First, Murphy conceded that, during her two years and a few months as Respondent's director of administration, she could not "think of any" occasion, other than the December optional and January mandatory meetings, when Respondent had conducted an optional meeting followed by a mandatory meeting concerning the same subject. Indeed, she was unable to recall any instance prior to December when an optional meeting had been announced for Respondent's entire staff. Yet, she testified that it would have been "likely" that she would have learned of past mandatory and optional meetings after they occurred, if not beforehand. No other witness described either another optional all-staff meeting, other than the one of December 12, or any other instance where the same subject had been presented to employees at both an optional meeting and a mandatory one.

Second, Respondent made an effort to directly connect the competency-based program's unveiling with the wage increases conferred on December 20. Indeed, that connection was sometimes indulged by all counsel. But the testimony and other evidence makes that a difficult connection to conclude actually had existed. To be sure, hourly wage rates were announced to employees, in connection with the job classifications and competency classifications of the competency-based program. Even so, Dillon admitted, "There weren't any pay increases announced at that meeting [December 12]. There was simply an overview of how the pay levels would be when the assessments took place." In fact, assessments did not begin under the program until Spring of 1997.

Third, aside from the choice of the December 12 date for the optional meeting, the General Counsel does not allege that the act of having conducted a December meeting to unveil the competency-based program to employees, of itself, had constituted a violation of the Act. Neither, unsurprisingly, is it alleged that that program had been cobbled together when Respondent learned about the Union by December 6 and, then, communicated during an optional meeting with employees six days later. That is, there is no allegation that formulation of the program had been unlawfully motivated.

What the General Counsel does contend is that, during those meetings, Respondent's officials told employees that those hired after January 1, 1994, indisputably the vast majority of employees working for it by late 1996, were to be classified as "trainee/probationary employees," with the natural result that they would lose their regular personnel-classified status and revert to the status of probationary employees, thereby becoming vulnerable to termination without recourse to procedures available to regular-classified employees.

There is no basis for concluding that such a message had been communicated explicitly to employees during the December 12 and January 6 meetings: that those hired after January 1, 1994 would again be personnel-classified as probationary employees. Rather, that argument is based upon inference drawn by comparing three of the overhead transparencies utilized during those meetings and the purportedly implied message which they contain, viewed in the totality of all three of them.

The first one of them reads:

**When you are first
employed at PICA**

**you are a
TRAINEE.**

Trainee = Probationary Employee

5

Of course, as discussed in the immediately preceding subsection, all of Respondent's employees had experienced, or were experiencing, probationary status during their first year of employment with it.

10

A second transparency, shorn of horizontal and vertical lines appearing on it, states:

**CRITERIA - Teachers, Drivers, P/C
Advocates, Nutrition Staff**

15

Status	Worked for PICA previous to 12/31/92 and held current position for 2 or more years	Worked for PICA previous to 1/1/94	All Others
Trainee			X
Apprentice		X	
Journey	X		

20

25

30

The third transparency is for assistant teachers. It is essentially identical to the one quoted in this paragraph. The lone substantive difference is that the legend "**Attained CDA and worked for PICA previous to 12/31/92**" appears above the first vertical column, in place of "**Worked for PICA previous to 12/31/92 and held current position for 2 or more years**".

35

40

Now, it should not be overlooked that not one of those three transparencies state expressly that employees hired after "**1/1/94**" were to be personnel-classified as "**Probationary**". Only one transparency even uses that term. True, it does equate that term with that of "**Trainee**". But, if that additional portion of that transparency is to be considered in connection with phrase "**Probationary Employee**," then so, too, must other items stated by that same transparency. A single phrase cannot simply be removed from its context. And the remainder of that transparency concerns staff "**first employed at**" Respondent. That, of course, is consistent with Respondent's historic practice: Staff "**first employed**" have always been personnel-classified as "**Probationary Employees**".

45

There is no employee-testimony about what had been said at the December 12 optional meeting. Jensen and Radder testified about the January 6 statements by Murphy. The former gave no testimony that would support a conclusion that Murphy had said that employees hired after January 1, 1994 would be classified as probationary.

Taking Jensen's testimony one step further, she testified that, following the January 6 meeting, she had discussed her regular personnel classification with Center Director Gretchen Hengemuhle. According to Jensen, Hengemuhle had said specifically that Jensen's trainee-status "wasn't that kind of probation" – presumably, given the sparse testimony by Jensen about that discussion, meaning not the kind of probation encompassed by the personnel-

classification of probationary-regular.

Of course, under Respondent's competency-based program, an employee competency-classified as "trainee" is in a sense probationary. As described in the immediately preceding subsection, failure to achieve satisfactory assessment as a trainee results in that employee being restored to his/her previous job classification or, alternatively, to being terminated. But imprecise use of the term "probationary" – in which Jensen no less than Hengemuhle appears to have engaged during their somewhat briefly described conversation – cannot be said to constitute a basis, standing alone, for concluding that all trainees were to lose their personnel classification as regular employees and again be personnel-classified as probationary.

Radder did give testimony which appeared initially to show that Murphy had equated all trainees hired after January 1, 1994, not merely those in their first year of employment by Respondent, as probationary: "we were told why we were given the raises because there was a new compensatory [sic] pay program and I was a trainee because I had been hired after January 1, 1994 and was therefore a probationary employee"; "Leann [sic] said that trainees were people who were hired after January 1, 1994. That if you were a trainee, you were a probationary employee"; and, "She said that if you are a trainee you are also a probationary employee." But, the seeming straightforwardness of that testimony became clouded by Radder's answers to further questions. In fact, some of those answers tend to reveal that Radder had become confused as he had been listening to Murphy and, further, that his above-quoted accounts of her remarks were the result more of his subjective impressions and imperfect recollection, than of what she actually had said on January 6.

Radder acknowledged having been confused by what he heard on January 6 as to whether he was to be probationary or regular under the program which Murphy was describing:

Q It's a fact, is it not, that use of the word probationary still meant that you would be probationary during your first original year of employment?

A You would be probationary during the first year of your employment, yes.

Q But you would not be probationary thereafter would you?

A That was not said.

Q Are you sure?

A I do not recall that being said.

Q Was there anything else said or viewed at that meeting that caused confusion to you as to your personal status?

A For me it was really the trainee equating probationary employee.

In fact, going one step further, Radder admitted that he was testifying as to what Murphy had said based upon his interpretation and impression of her words: "I interpreted this probationary status as being I would be a probationary employee until I became an apprentice," and, "I was under the impression that I would be a probationary employee as long as I was a trainee and therefore could be dismissed at any reason or any time. Therefore that is what I took this to mean."

It is understandable that even a well-educated person could become confused upon first hearing a description of the competency-based assessment and pay program; at one point Dillon mildly chided counsel, "It's complicated." Obviously, there had been a point during the January 6 meeting when Murphy told employees that newly hired employees would be both trainees and probationary employees. Equally obviously, she also told them that employees hired after January 1, 1994 were to be competency-classified, or subclassified, as trainees. In the context of hearing both messages, for the very first time, it would not be unreasonable for employees to become confused and extrapolate part of the message being conveyed in connection with the first above-quoted transparency into the descriptions in other transparencies. However, in the final analysis, as all beetles are bugs but not all bugs are beetles, there is no evidence that Respondent's said, nor that Respondent intended, that all trainees were to be reclassified as probationary employees, thereby losing their regular personnel classifications, although all probationary employees – those working during the first year of employment with Respondent – would be regarded as trainees.

Two other portions of Radder's testimony should not be overlooked, since they shed further light on what was said to employees on December 12 and January 6. As of those dates the term "assessment" was not one totally foreign to Respondent's employees. It is undisputed that Respondent had conducted voluntary assessments for apprentices during the Spring of 1995. At least some of Respondent's employees, other than apprentices, were aware that those assessments had been conducted. Radder acknowledged having known about them, although he was uncertain as to whether they had been characterized as competency-based: "I can't recall. They may have been referred to as competency based assessments but I can't remember."

Nor were December 12 and January 6 the first dates upon which Respondent's employees became aware that employees hired after January 1, 1994 were to be subclassified as "trainee". Radder testified that when he first had been hired during March of 1995, he had been assigned to a training session for employees then-classified as trainees. As that 1995 meeting progressed, he testified, "a teacher -- Geneva Taylor I believe it was -- came in from the apprentice head teacher's room saying she had been sent to the trainee room. *Saying she had been hired after January 1, 1994 and was told that she was a trainee.*" (Emphasis supplied.) According to Radder, Taylor was not a new employee: "No, she was not new. She had been there for awhile." In the face of that testimony, it is difficult to conclude that Respondent had abruptly selected the January 1, 1994 date upon learning of the Union's campaign, as some sort of vehicle for re-personnel classifying most of its employees as trainees, for no reason other than to convey to them that they were becoming more vulnerable to discharge.

In that respect, one additional aspect of the testimony should be considered. Marchessault testified that, during August of 1994, she had described to Respondent's assembled employees the status of the then-being-developed competency-based assessment and pay program, as Respondent then anticipated that it likely would develop. She testified that, during that meeting, she had announced January 1, 1994 as the separation date for apprentice and trainee subclassifications or competency classifications. Why had she chosen that date? Marchessault explained:

That was in the middle of a winter break. We hadn't hired any new employees so there wouldn't be any confusion whether someone was hired on that day or after that day so we didn't have to worry about an exception in making it equitable.

And that honored our staff who had been there. That gave recognition to their

service as well as it looked at -- this was a fairly new staff, anyone hired after January 1, '99 -- 1994. So that was our decision. Arbitrary? Absolutely. Looking at a calendar saying what would be the best day to choose and when I stood in front of the group in August that's what I told them.

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Of course, Radder had not begun working for Respondent until after that meeting. But, Jensen had been employed by Respondent as an assistant teacher at that time. Yet, she was not recalled to dispute Marchessault's description of that August, 1994 meeting. Nor was any other employee who had been working for Respondent by that month of that year. Of course, Radder's description of what Taylor had said during March 1995 corresponds with what Marchessault testified that she had said during the preceding August.

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Turning to the other principal December event, the wage increases conferred on December 20, Respondent had saved approximately a quarter of a million dollars by reorganizing its transportation component, as described in subsection B above. In addition, before the beginning of the 1996-1997 school year, it anticipated an increase in Head Start funding from ultimate funding then being considered in Congress. Still, at that point in time, there could be no certainty about any specific amount for such an increase.

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Whatever the amount of increased federal funding, Respondent anticipated that the Head Start Bureau's Administration for Children and Families, as it had in past years, would establish guidelines for a proportion of each recipient agency's allocation of increased amounts that would have to be spent for employee wages and fringes. Indeed, whatever amounts recipient agencies, such as Respondent, received in increased Federal funding would have to be spent by the end of Federal fiscal year 1997, since any surplus would be deducted from the following fiscal year's Federal allowance. These facts tend to undermine any argument that Respondent had no intention of granting wage increases to its employees prior to the time that it learned of the Union's campaign. That is, under Federal funding requirements, as a practical matter Respondent would have been obliged to grant increases at some point. Of course, that does not answer the question as to what point those increases would have been conferred.

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Finance Director Thunder testified that Respondent's executive group -- Dillon, the two directors of operations, the director of community involvement, the director of administration, the personnel human resources director and Thunder -- made an August decision to grant wage increases to all of Respondent's employees. Obviously, no amounts were then set, though it was determined that the sources for increases would be money saved as a result of the transportation component reorganization, eventual Federal funds increase which Respondent would receive, and whatever funds could be secured from other sources. Thunder testified that it had been left to her to flesh out that overall decision, by determining specific amounts for the increases which would be given to each employee.

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That was not a very simple matter for Thunder to undertake during August. At that point the only certain source of funding was the approximately quarter of a million dollars saved as a consequence of reorganizing the transportation component.⁴ Any rumors about the precise of amount of Federal Head Start funding increase was subject to the fact that, as Dillon pointed out, “things can change at the last minute,” leaving Thunder with only “reason to believe there might be some additional funding available.” Even if an increase was passed in Congress and signed by the President, of course, that still left uncertain the specific proportion of that increase which Respondent would be receiving.

To be sure, Dillon claimed generally that “we can judge pretty much what we’ll get of” any increase. But, she never explained with particularity what she meant by that generalization: how such a determination could be made by Respondent. Indeed, in its “PROGRAM INSTRUCTION” of December 2, discussed further below, the Head Start Bureau announced “an increase of \$411,671,000 over the FY 1996 funding level,” but also stated, on page 7 of that document, “Your Regional Office will notify you in the near future of the exact amount of COLA and quality improvement funds for which you are able to apply.” Obviously, the full \$411,671,000 was not going to be given solely to Respondent. Thus, based upon the particularized evidence presented, Respondent would not know how much of the increase would be allocated to it until receipt of notice of that amount from its “Regional Office.” Equally obviously, Thunder would have had no idea during August of what that amount was going to be.

Another factor confronting Thunder during August was the competency-based assessment and pay program then in the process of being finalized. As pointed out in subsection C above, one aspect of that program was hourly pay rates which the program would be allocating to the various competency classifications of the various job classifications. So far as the evidence shows, as of August those rates had not been determined.

In that connection, Thunder also confronted an added problem respecting situations where two employees would be in the same competency classification of a job classification, but already were receiving different pay rates based upon comparative longevity of employment with Respondent and resultant prior pay increases – and, probably also, as a result of comparatively greater job knowledge and proficiency of performance. For example, two drivers each might qualify for the competency-classification of mentor. Because one had worked for four or five years longer than the other, and as a result of wage increases conferred during that four or five year period, the first mentor driver might be receiving a higher wage than the less senior one. Certainly, it would make no sense to lower the rate of the more senior driver, to correspond with the competency program hourly rate for a mentor driver. Nor would it necessarily be sensible to simply raise the less senior driver’s rate to the higher level of the more senior driver. That problem becomes even more sensitive if the less senior driver happened to be more knowledgeable and proficient than the more senior one. Taking the process one step further, as Marchessault explained, the competency-based program did not contemplate coverage of support staff. So, that program provided no guidelines for those employees.

Confronting the foregoing factors, Thunder set out to formulate a schedule of individual increases for each of Respondent’s employees. She was personally unfamiliar with the performances of Respondent’s almost 300 employees. So, she had to obtain information on the status and pay of each. In addition, their supervisors would have to make

⁴ For purposes of comparison, Thunder testified that the total of the December increases amounted to “probably close to \$400,000.”

recommendations on proposed increases, based upon those supervisors' personal knowledge of the employees whom they supervised. And no figures arrived at by Thunder could be regarded as final, given the Federal funding situation.

5 Still, by October 9 she had prepared and printed a schedule of individual increases – on a list of employees which recited their names, then-current hourly and salary rates, and suggested hourly rates and salaries for each named employee. However, that list could never be utilized as a final document. For, the suggested increases were based only on, Thunder testified, “existing money that we knew we already had,” and, notwithstanding Dillon’s above-
10 quoted profession about being assertedly able to “judge pretty much what we’ll get,” did not include any funds which might be received from increased Federal funds. As a result, her October 9 suggestions “were not eventually approved,” testified Thunder.

15 By October 21 Dillon was reporting to her staff that Congress had passed, or soon would pass, a Head Start funding increase of \$411 million. In addition to her report of that fact, the minutes of the meeting when she did so state, “The salary level for staff is being evaluated and re-organization of other components is being considered as well, new performance standards will be out by November.” The latter, presumably, referred to standards Marchessault was finalizing for the competency-based assessment and pay program.

20 During a November 1 meeting with Dillon and Director of Operations Lucia Rangel, Thunder testified that Dillon received a telephone call from Terry Davis, a fiscal specialist apparently for Regional Office Head Start Bureau Administration for Children and Families. Afterward, testified Thunder, she was given by Dillon “some indication about how much money
25 we were going to be getting” – “a percentage” – “and wanted me to do a calculation to see how much actual dollars that would mean to” Respondent. According to Thunder, Dillon “again asked me how long it was going to take me to, you know, do some more calculations based on the amount of information we had about our new funding going forward to 97-98,” because “there was some, you know, sense of urgency because we wanted to tie it into the, you know,
30 competency levels.”

In fact, Dillon testified that “in early November ... we got down to the specifics of tying the dollar amounts to the competency levels.” Yet, in contrast to her relatively precise testimony as to the course which she had pursued leading to preparation of her above-
35 described October 9 increases schedule, Thunder advanced no similar particularized description of action she had taken after that November 1 meeting. Instead, her description of what she had done after November 1 next picks up on December 4: the computer-date shown on a list of “SALARIES as of 12/04/96” (Respondent’s Exhibit Number 77), which she characterized as “the final document for [sic] as to where we were going with the competency
40 wage increases.” Asked for the date on which that document had been created, Thunder answered: “This document was -- I actually had been working on this document for probably since we -- in *early December* when we got the letter about our -- you know, about our specific funding.” (Emphasis supplied.) Of course, if Thunder had not started working on it until “early December,” that meant that the “SALARIES” document had not been one created as a result of
45 the November 1 meeting.

With respect to the increases shown on the “SALARIES” document, testified Thunder, “We based them on the fact that we knew we were going to get federal increases. We had the exact dollar amounts and we knew how much we were going to be able to spend on salary increases for the year.” That testimony has a certain independent significance. The pay increases would be included in paychecks issued to employees on December 20. Asked how long that had been after she had determined what Respondent’s funding would be, Thunder

responded: "Probably about a month and a half." Yet, that would mean that Thunder somehow had determined during early November what Respondent's Federal funding increase was going to be. Yet, as stated above, Thunder testified that she had known about Respondent's "specific funding" only during "early December." Beyond that, Dillon never claimed that, during their
 5 November 1 telephone conversation, Davis had told her how much money was going to be allocated to Respondent.

Of course, during November Thunder could have made a rough or tentative
 "calculation," based upon the "percentage" indicated by Dillon, which then could be used as the
 10 basis for later modification and finalization of precise amounts to be conferred as individual increases. However, any such conclusion is obliterated not only by Thunder's failure to testify that that was what she had done, but also by her testimony in connection with two other documents.

The first is the December 2 "PROGRAM INSTRUCTION", mentioned above. The other
 15 is an undated Funding Letter, sent to Dillon by Assistant Regional Administrator L. Kent Wilcox of Administration for Children and Families (Respondent's Exhibit Number 76). According to Thunder, she had received the December 2 document "just before I got this R-76." Thus, regardless of the lack of a date, there can be no question that both letters had issued during the
 20 same early December time period. Moreover, it would appear, though it cannot be said with certainty, that Wilcox's letter represents the first truly concrete notice to Respondent of the means by which a portion of the total Federal funding increase would be allocated to it.

What is certain from Thunder's testimony is that those two early December letters
 25 constituted her first concrete basis for calculating the wage increases on the basis of funding that actually would become available to Respondent. Thus, she testified with reference to those two documents,⁵ "this gave us some solid figures on where to go forward -- you know, how much we could go forward with on salary increases." And she later confirmed, during cross-examination, that it had not been until she had received the December 2 "PROGRAM
 30 INSTRUCTION" that Respondent had confidence that it would have the funding needed to grant a wage increase which could be maintained into the next year. Given that testimony and her above-mentioned "SALARIES as of 12/04/96" document, it is difficult to escape a conclusion that not until early December, rather than during November, had Thunder begun finalizing specific increases for employees.

If so, it is objectively unlikely that, in the ordinary course of events, Respondent would
 35 have conferred those increases as early as December 20. At certain points Thunder gave testimony which might lead to, at least, an inference that the process of calculating individual wage increases had been a relatively easy one. For example, at one point she appeared to be
 40 testifying that all she had done was to compare the employees' job and competency-classifications with corresponding wage rates recited in the competency-based program: "They [wage increases] were based on people's competency level and that's pretty much it. I mean that's -- you know, that's the whole ball of wax there." Of course, the reliability of so simple an explanation encounters heavy going in the face of her own above-described problems

45 ⁵ There is an obvious misstatement attributed to counsel on page 2153 of the record on which Thunder's answer appears. The transcript there states "Respondent 72". But, that exhibit is a 1993 inter-office memorandum, concerning aspects of the competency based program. Clearly, it had no relation to the questioning being conducted of Thunder at that point in the transcript. Either counsel misspoke or his question was not reported with complete accuracy.

determining the increase to be given to each employee, arising when she first began calculating possible wage increases during August.

Furthermore, other testimony given by Thunder shows that so simplified an explanation, as that set forth in the preceding paragraph, cannot be accepted at face value. She testified that, for past wage increases, "It usually takes us a minimum of thirty to sixty days" to "actually get the increase to employees," after "find[ing] out that [Respondent has] funds available for the increase." Indeed, she explained further, "Thirty days would be really pushing it but we've done it sometimes, you know, in like a month and half, you know is probably average."

So far as the evidence discloses, in describing the time needed to confer past increases, Thunder had been referring only to situations where there had been nothing unusual accompanying those increases. In contrast, the Fall-Winter increases were being planned in extraordinary circumstances: they were intended, at least as initially contemplated, to be integrated into wage rates set out in the competency-based assessment and pay program. To accomplish that, as described above, Thunder had to take into account the comparative tenure and competency levels of each employee in each job classification, so that more senior and proficient personnel would not, in effect, suffer a comparative disadvantage when the wage increases were conferred. Indeed, variances among December wage increases was acknowledged by Dillon who testified, "I think there was some people actually got as much as \$4 an hour," while other received increases of only 50 cents an hour.

Nor can one overlook the problems posed for Respondent by Thunder's testimony regarding the procedures followed from receipt of the "PROGRAM INSTRUCTION" and Wilcox's letter to conferral of the wages increases on December 20. As mentioned in subsection C above, she described an early December meeting at which center and component directors assertedly had been informed about "the final figures for specific increases [which] were in place at that meeting." Of course, as pointed out in that subsection, any such meeting would have occurred after Respondent had learned about the Union's organizing campaign among its employees.

Beyond that, several problems arose in connection with Thunder's descriptions about that meeting. She testified, at least initially in one instance, that she had brought with her to that meeting two documents. One, she claimed, was the above-mentioned "SALARIES as of 12/04/96". During this meeting, testified Thunder, "we talked about this chart here, you know, this R-77." Indeed, in connection with that document, Thunder gave relatively extensive testimony about discussion conducted during the meeting with center and component directors. The problem is that the "SALARIES" document, which purportedly formed the basis for that supposed discussion, had not been printed, according to the legend in its upper right corner, until "12/13/96," well after Thunder described that meeting as having occurred and, also, after Dillon had presided over the optional meeting with employees during the immediately preceding day.

The second document to which Thunder referred is an "**Hourly Rates for Staff**" document which she described as "the new wage chart for all direct service [operations] staff." As to that chart's use at the meeting with center and component directors, Thunder testified, "This is the final product. This was at that meeting if that's what, you know, your question was. This document came to the meeting with me." Indeed, she testified, "I had printed copies for all the center directors and the management staff."

In the upper right corner of that chart, however, appears the date "12/12/96" – meaning that it also had not been printed until after the date on which Thunder placed her meeting with

center and component directors. This time Thunder eventually caught the discrepancy. Having done so, she beat a hasty retreat: "It wouldn't have been at the meeting before that if I hadn't, you know -- because as I indicated the December 12th in the upper right corner is the printing date of the document." Even so, that retreat left exposed, and unexplained as to its inherent inconsistency, her earlier assertions about having prepared copies of the chart for "center directors and the management staff" during that meeting conducted on a date before the chart had been printed.

E. Discharge of Rose Ryan

Once school resumed during 1997, following the Winter break, Radder resumed his union activities. Thus, he testified that he once more talked in favor of the Union to coworkers. He continued distributing the Union's literature both directly to employees at McKnight and South Branch Centers and, in addition, to particular Fraser and Glendale Centers employees for them to, in turn, distribute to other employees at those two centers. Most importantly, Radder testified that he had continued soliciting signatures on authorization cards. Indeed, as described in subsection C above, it may have been during January that he had approached Knox to urge her to support the Union.

One authorization card obtained by Radder from a coworker was offered and received into evidence. It bears the handwritten date "1-29-97", and is signed by Rose Ryan. Both Radder and Ryan testified that the former had solicited the latter's signature on that card. Signing it had been Ryan's lone activity in connection with the Union prior to her termination almost a month later, on February 20. That discharge is alleged to have been unlawfully motivated by Ryan's union and protected concerted activity. In addition to denying that it had fired Ryan because of any union activity in which she may have engaged, Respondent also denies that it had even been aware that she had signed an authorization card.

As with many of Respondent's employees, Ryan initially came into contact with Respondent when one of her children was enrolled in its Head Start program. She became involved as a substitute teacher and eventually was hired as an assistant teacher on October 29, 1996, though she did not start working for Respondent until Monday, November 11. Thus, her hiring and commencement of work did not occur until after the 1996-1997 school year already had started.

Ryan worked at McKnight Center until the end of the school day on February 20. At that point, she was summoned to the office by McKnight Center Supervisor Davis. He read to, and handed, her a one-page "MEMO" which states, "**FR: Gretchen Hengemuhle, McKnight Center Director**", and "**RE: First Aid/CPR Certification Completion/Termination**". In pertinent part, its text reads, "Your employment with this agency is terminated, effective immediately, for failure to meet basic job requirements by receiving required training," and continues in the fourth paragraph, "You have missed both previously scheduled PICA provided training session(s). Failure to attend and complete mandatory training is grounds for immediate termination." It is uncontroverted that, in addition to reading the memo to Ryan, Davis also said to her that he was sorry and had "tried to keep you on," adding that Ryan had been "a very good teacher" and that if she needed "a good reference you can always get a good reference by me." Ryan replied only that she realized she was in the wrong and the discharge was her own fault. Those remarks by her were rooted in the training requirements mentioned in Hengemuhle's above-partially quoted "MEMO".

Operations staff is required by Respondent, based upon government requirements, to undergo six to eight hours of first aid training and, separately, six to eight hours of CPR training.

Obviously, the purpose for that training is to ensure child safety. As Respondent's Health and Nutrition Services Assistant Deborah Townsend explained:

5 State licensing requires us to -- our staff to be certified, teachers, assistant
teachers, in first aid, and anybody who would be alone with the children which would
inclusively be the drivers because they transport children without other staff and maybe
parent child advocates because they may be involved with the parent and their
children. So as far as state licensing it is required for first aid. CPR at least one person
10 in the building or anybody alone with the children on field trips, any staff people on field
trips, to be certified in CRP training and resuscitation.

In fact, Respondent imposes more hours of training in each area, according to Townsend,
"Because we care about our families and our children and we want to make sure that they are
safe, healthy and watch for their welfare."

15 Neither the General Counsel nor the Union contest the source of Respondent's concern.
Further, they do not dispute the validity of the training required by Respondent. Finally, there is
no argument about the facts that such training has been required of all employees and,
moreover, that Ryan knew that she had to undergo it in order to retain her job as assistant
20 teacher at Respondent.

Ordinarily, first aid and CPR training is given before children start the school year,
during pre-school-year staff sessions. For employees such as Ryan, who begin work after the
school year has commenced, the training is scheduled on specified Saturdays during the school
25 year. For example, according to Respondent's Staff Master Calendars, during the 1996-1997
school year, mandatory first aid training was scheduled on September 28, October 26,
November 16, February 8, March 8 and April 12. Not shown on the Master Calendar for May,
but shown by a memo authored by Townsend, was an additional first aid training session
scheduled for May 31. The Staff Master Calendars also show that mandatory CPR training had
30 been scheduled for staff on December 7, March 22 and May 24.

Ryan had not started working for Respondent until the 1996-1997 school year had
already started. Nor until after the September 28 and October 26 first aid training sessions had
taken place. She acknowledged having been told in advance that she would have to attend the
35 November 16 first aid training session and, also, the December 7 CRP training session.
However, she attended neither one.

As to the November 16 first aid training session, McKnight Center Supervisor Davis
appeared as a witness for Respondent, after Ryan had testified. Yet, he never contested
40 Ryan's testimony that she had told him, with respect to that session, "this was the week of my
start date or starting on the job and my day care was not intact at the time so Charles Davis
said that he would let me slide by and not have to go to it since it was, you know, my first

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week.” Based on the above-described evidence, the next first aid training session would not occur until February.

As to the December 7 CPR training session, due to the flu Ryan left work during the early afternoon of Thursday, December 5 and did not return to work until the following Monday, December 9. On Friday, December 6, it is uncontroverted, she was telephoned at home by Davis who, informed that she was still ill, instructed Ryan to obtain a “doctor’s notice” concerning her illness. She did so and submitted it to Davis when she returned to work on December 9. At no point did Davis contradict any aspect of this description by Ryan.

Townsend, who monitors participating in these training programs, gave written notice to then-McKnight Center Director Sloan, by “Medical Component MEMO” dated November 19, 1996, about, *inter alia*, McKnight Center employees who had missed the November 16 first aid training session. Ryan’s name does not appear among the employees named, though she freely acknowledged that she had not attended that November 16 first aid session.

Her name does appear, as one of the three McKnight Center employees who did not attend the December 7 CPR training session, on a Medical Component MEMO from Townsend, bearing the date December 11, 1996. Even so, there is no evidence that Ryan had been disciplined in any manner for having missed that session. Indeed, there is no evidence that, after having submitted her “doctor’s notice” to Davis, anything had even been said to her about having missed the December 7 CPR training. Nor is there evidence that anything ever had been said to her about not having attended the November 16 first aid training session, after Davis had excused her from having to do so.

Ryan acknowledged that she was supposed to attend the February 8 first aid training session. It is of some interest, however, that her name is not included on the list of McKnight Center employees obliged to attend that session, as prepared by Townsend and transmitted to center directors, including both Sloan and Hengemuhle, by Health Component MEMO dated January 28, 1997. At the top of that list of employees appears the legend, “**Updated February 7, 1997**”. Furthermore, no evidence was presented of a memo from Townsend -- similar to the above-mentioned one of November 19 -- notifying center directors about employees, such as Ryan, who had not attended the February 8 training session. In fact, no evidence whatsoever was presented showing how Hengemuhle could have learned that Ryan had not attended the February 8 first aid training session. But, Ryan admittedly had not done so.

She testified, “I was having day care problems with it being the weekend and the woman that was taking care of my child could not take care of him and I had no other way of getting anybody to watch my kids at the time.” Some question was raised about the reliability of that testimony. Beyond that, however, she admittedly never telephoned Davis to notify him that she would not be attending the February 8 first aid training session, even though she acknowledged having been aware by that date of two memos, each dated January 17, 1997, which he had sent to the McKnight staff. One requires 72-hour notification to him whenever an employee will be “unable to work your full scheduled day,” which is stated specifically to encompass “all mandatory and evening events.” The other sets forth a procedure for calls concerning intended absences including specifically “sick, family emergency,” and recites Davis’s home phone and pager numbers.

When appearing as a witness for Respondent, Davis never contested Ryan’s testimony that on the Monday following the scheduled February 8 first aid training session, he had approached her in the hallway and had said, “Rose, you got to get to them CPR classes,” or, “Rose you better get to your CPR classes,” adding, “You know you’re going to get in trouble.”

She testified, without contradiction, that she had replied, "I can't help it, Charles. It can't be helped." Davis was never questioned about, and thus never given the opportunity to explain, what he had said to Ryan on February 10 and, moreover, what he had meant by whatever he had said to her in the hallway that day. Consequently, the record is left with evidence only that she had missed a *first aid* training session on February 8 and that he remonstrated with her during the next working day about her need to attend *CPR* training.

Of course, as set forth above, no CPR training had been scheduled between December 7 and March 22. Although Townsend testified that she always communicated to center directors the names of people who failed to attend mandatory training sessions, there is no particularized evidence whatsoever that, as of February 10, Davis had been aware that Ryan had missed the February 8 mandatory first aid training session.

Hengemuhle never explained the facts which had led her to issue the February 20 termination MEMO to Ryan. The explanation provided in that memo requires some examination of what has happened to employees who failed to attend first aid or CPR training sessions after having been scheduled to do so. For, evidence of disparate treatment of union supporters is one indicium of unlawful motivation, see, e.g., *NLRB v. Big Three Industrial Gas & Equipment*, 579 F.2d 304, 312 (5th Cir. 1978), cert. denied, 440 U.S. 960 (1970); see also, *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75 (8th Cir. 1969), just as, by contrast, "Consistency with past practices undercuts suspicions that [alleged unlawful acts] were for unlawful reasons." (Citation omitted.) *Pullman Power Products*, 275 NLRB 765, 767 (1985).

Introduced during the hearing were a series of Health Component MEMOs which Townsend had prepared for each of the first aid and CPR training sessions occurring between November 16, 1996 and May 31, 1997. She testified that names of the same employees which appear on more than one of those lists shown that "they did not attend the previous one [training session] that they were assigned to attend." "Occasionally, it does, yes," she further testified, occur that employees fail to show up for their scheduled training sessions. Yet, other than Ryan, Respondent adduced no evidence of any such employee who had been terminated for having failed to appear at mandatory first aid or mandatory CPR training sessions.

Of the names appearing on the 1996-1997 lists, one stands out as particularly significant in the context of Ryan's termination: that of Fraser Center employee Tuesday Rendon. Her name appears on the lists for mandatory first aid training sessions scheduled for November 16, February 8 and March 8. Thus, Rendon, like Ryan, had missed the mandatory first aid training sessions scheduled for November 16 and for February 8. But, unlike Ryan, Rendon was apparently allowed to continue employment with Respondent, since she was scheduled for mandatory first aid training at the March 8 session.

It cannot be said that any distinction existed between those two women based upon failure to have attended the December 7 mandatory CPR training session. For, Townsend's lists show that Rendon also had been scheduled for CPR training on December 7. Her name appears again on the list of employees scheduled for the March 22 mandatory CPR training session. Thus, it appears that Rendon, like Ryan, had missed the CPR training session conducted on December 7, as well as the mandatory first aid training sessions on November 16 and on February 8. Unlike Ryan, however, there is no evidence that Rendon had been fired for having failed to attend those mandatory training sessions. To the contrary, so far as the record shows, she had remained employed by Respondent long enough to be included for first aid

training on March 8 and for CPR training on March 22.⁶ Given Townsend's testimony that she always informs center directors when their employees have not attended training, and the fact that Rendon's name appears on Townsend's written communications to center directors identifying employees who did not attend first aid training on November 19 and CPR training on December 7, certainly there is no basis for inferring that Rendon's absences at the November 16, December 7 and February 8 training sessions had been somehow overlooked.

Even so, evidence of disparate treatment, though an indicium of discriminatory motivation, takes the General Counsel only a partial distance in establishing unlawful motivation. "[A]n inference of union animus based upon disparate treatment can be made if the only difference between two differently treated employees is the illegitimate criteria at issue (i.e. union activity)." (Citation omitted.) *Asarco, Inc. v. NLRB*, 86 F.3d 1401, 1408 (5th Cir. 1996). It is the General Counsel's burden to establish "a causal connection between an employee's protected union activities and an action by the employer detrimental to the employee's tenure or terms and conditions of employment." (Footnote omitted.) *P. W. Supermarkets*, 269 NLRB 839, 840 (1984).

Crucial to showing such a connection is some basis for concluding that the employer had, or likely had, knowledge of the alleged discriminatee's union activities. "In order to establish a violation of section [sic] 8(a)(3) under the Act, the charging party must prove that the employer had knowledge of the employees' union activities." (Citation omitted.) *International Brotherhood of Carpenters v. NLRB*, 127 F.3d 1300, 12310, fn. 6 (11th Cir. 1997). Or, at least, it must be shown that the employer suspected or likely suspected the alleged discriminatee of such activities. *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), *enfd.*, 95 F.3d 681 (8th Cir. 1996), *cert. denied*, ___U.S.___, 117 S.Ct. 2508 (June 27, 1997), and cases cited therein.

As stated above, Ryan's only union activity had been signing an authorization card, given her by Radder, on January 29. Aside from that, there is no evidence that she engaged in any other activity on behalf of the Union. The General Counsel attempted to provide direct evidence of knowledge that she had signed the card, through testimony by Ryan and Radder. However, upon close examination, their accounts of what supposedly had occurred are too inconsistent for either one to be regarded as reliable.

Both testified that, when Radder had solicited her signature and when she had signed the card, they had been standing on the sidewalk in front of the McKnight Center's main entrance. And both testified that McKnight Center Supervisor Joni Lawrence, an admitted statutory supervisor, had been watching them, assertedly from a car parked in the parking lot in front of that center. To understand their accounts, some description of the area is necessary.⁷

⁶ Also introduced was evidence concerning non-attendance by Michelle Knox at scheduled training sessions. However, her situation differed from that of Ryan and Rendon. Knox had attended four hours each of first aid and CPR training. She had received certification cards showing that she had satisfied those training requirements, obviously as a result of some sort of error. Still, relying upon those cards, Knox did not attend any later training sessions, even though she had been scheduled to do so. Eventually, Davis talked to Knox about her non-appearance at those training sessions. When she showed him the certification cards, they seemingly left him confused and he directed Knox to speak with Townsend about the situation. That conversation cleared up the discrepancy and, at the first opportunity thereafter, Knox completed her required training. That situation is hardly comparable to that of Ryan who, of course, had not attended any of the training sessions and possessed no certification cards.

⁷ Written descriptions always suffer the deficiency of not conveying that which is being

Continued

Essentially, there is a sidewalk extending from one end of the McKnight Center main building to a point approximately two-thirds of the distance along its front. There, the sidewalk ends in a lawn which extends along the remainder of that building. If one were to continue walking from the sidewalk's end across that lawn, one would encounter another sidewalk, running perpendicular to the first sidewalk. On the other side of that perpendicular sidewalk is a building in which is located, at least, the center's kitchen. A door to that kitchen opens onto the perpendicular sidewalk and can be seen, across the lawn, from the end of the first sidewalk, the one extending two-thirds along the front of McKnight Center's main building.

On one side of that sidewalk, of course, is the main building, itself. Near the end of that sidewalk, where it adjoins the lawn, is a recessed entrance to McKnight Center. On the outer side of that sidewalk, and extending along the outside of the lawn, is a parking lot. There, purportedly, Lawrence had parked a vehicle into which she got and sat, watching Ryan sign the card for Radder as the two teachers stood, talking for about ten to fifteen minutes, on the first sidewalk, in front of the recessed main entrance to McKnight Center.

Radder testified that, during his conversation with Ryan, Lawrence had "exited the [kitchen] building" and had "walked slowly to her car [in the parking lot] watching us the whole time." Once in her car, testified Radder, Lawrence "started up the car still watching us, and sat in the car with the car running watching us talk." According to Radder, Ryan's back had been to the parking lot and she had not observed Lawrence until the end of their conversation -- after Ryan had filled out the card, signed it and returned it to him. Radder was quite specific as to how he had perceived when Ryan first spotted Lawrence: "Because she was kind of surprised and she said to me, look who's watching us." But, Ryan's testimony in that regard tended to contradict that of Radder.

She testified that she had seen Lawrence observing the two teachers' conversation from Lawrence's "car right -- like right -- she was like right there in the parking lot sitting in her car." There can be no question that Ryan was testifying that she purportedly had observed Lawrence before the end of the conversation with Radder: "Because she kept stare -- I mean it looked like she could actually -- she was just staring. I mean *every time I glanced*". (Emphasis supplied.) "Yes, she was," testified Ryan, "watching when [Ryan had] filled out the card[.]" Obviously, Ryan was testifying that she supposedly had seen Lawrence even before having completed filling out the card and returning it to Radder, contrary to his account.

Of course, that discrepancy is not necessarily a fatal one. After all, Radder might not have realized that Ryan had seen Lawrence even before she had returned the card to him, though it is difficult to square such an earlier perception with the reaction which he attributed to her when he believed that she had first seen Lawrence. But, if, as Radder claimed, Ryan's back had been to Lawrence, it seems odd that Ryan would have been seeing Lawrence "every time I glanced" at Lawrence, while in the process of filling out the card, and that Radder would

described. A graphic illustration of what is being conveyed in the succeeding paragraph is provided by General Counsel's Exhibit Number 55.

not have observed Ryan taking those “glance[s].” Were Ryan to have been periodically “glanc[ing]” at Lawrence, surely Radder would have seen Ryan turning to do so.

More significantly, Ryan claimed that Lawrence’s car had been parked “not too many feet from where we were standing” on the sidewalk. According to Ryan, Lawrence’s car had been in a parking space located next to the sidewalk. There can be no mistake about Ryan’s meaning: “the [building entrance] door was right there. The sidewalk is right here and the parking lot is right here and she was in the first spot that you could park because usually the buses are right there. Then there is a parking spot where she parked.” Her positioning of Lawrence’s vehicle next to the sidewalk – where, of course, Lawrence would have been more likely to see the card that Ryan signed – was emphasized by her estimate that Lawrence had been parked a little beyond arm’s length from where she and Radder had been talking that day.⁸

The problem with Ryan’s testimony as to where Lawrence had been parked that day is that it conflicts dramatically with Radder’s description of where Lawrence had been parked. He testified that Lawrence’s car had been parked not in the row abutting the sidewalk, as Ryan claimed, but in the next parallel row for vehicles to park – one parking row away from the sidewalk and the parking row adjoining the sidewalk, and in a parking row separated from that sidewalk and adjoining parking row by, as well, a driving area between the two parking rows. In fact, Radder estimated that the closest Lawrence had been to Ryan and himself, as she walked from the kitchen door to her vehicle and sat in it, had been “between 20 and 25 feet” – a distance from which it would have been quite difficult, if not impossible, to even observe the relatively small authorization card which Ryan filled out and signed, much less the words printed on that card.

There is another aspect to that above-described second discrepancy between the accounts of Radder and Ryan. As pointed out above, Ryan testified that Lawrence had been in a car parked in a parking lot space adjoining the sidewalk. Radder agreed that there had been a car parked where Ryan had placed Lawrence’s car: “There was someone in a car next to us,” possibly “in the No Parking spot.” However, he testified that he did not “notice who was sitting in [that] car” and, most importantly, testified that following his conversation with Ryan, she “got into the car -- and I can’t recall if she got into the passenger side or the driver’s side -- she got into the car, closed the door” Inasmuch as there is no evidence that Ryan had gotten into some car other than the one which Radder described initially as having been “next to us”, that is strong evidence that Ryan had been attempting to portray the very car in which she had ridden away from McKnight Center that day as the car in which Lawrence supposedly had been sitting and watching the conversation between Radder and herself.

So far as the record shows, there would have been nothing particularly unusual about two teachers participating in an after-hours discussion outside the entrance to McKnight Center. Even if such a conversation were to attract a center supervisor’s attention, it would not

⁸ Later interrogation suggested a 30-foot distance which sufficiently confused the situation and Ryan to the point where she adopted that distance at one point. Nonetheless, she also testified, “I don’t know the exact feet she was but she was a little distance,” and disavowed a roughly 30 feet distance when paced off by counsel. Instead, she agreed that an arm’s length would be around five feet and reasserted, “we were right on the sidewalk and the parking lot is right there.” In the end, this confusing interrogation did not serve to budge Ryan’s initial testimony that Lawrence had been parked adjacent to the sidewalk when she had been speaking with Radder.

necessarily have meant that some type of nefarious – union – activity was on that supervisor’s mind. In fact, if the two teachers’ conversation had attracted a supervisor’s attention, Ryan supplied a plausible alternative explanation for a supervisor to have been staring at Radder and her that day: “I even mentioned to Jan, I said, ‘I can imagine what -- you know, for the reason
 5 why she is staring I can imagine what she’s thinking that we may be passing our numbers or were trying to date or whatever’ because the way they gossip in that school.” Interestingly, Radder did not include that remark by Ryan when he described what had occurred that day.

Not only did Lawrence deny having seen Ryan and Radder exchanging information on that day and deny, also, having been seated in a car parked on the McKnight Center parking lot. She also testified that, as a result of a car accident which had disabled her car, she had
 10 been riding the bus to and from work during January and had not driven, nor ridden with anyone else, during that month, as well as during some preceding months. Not until during the following month, Lawrence testified, did she resume driving her car to and from work. No
 15 evidence exists which contradicts that testimony by Lawrence.

F. Discharge of Jan Radder

During February and into March Radder continued distributing union literature and soliciting employees’ signatures on authorization cards. And, in the final analysis, Gretchen Hengemuhle, who succeeded Sloan as McKnight Center director during late January or early February, admitted having known about Radder’s efforts to solicit other employees’ signatures on authorization cards. During direct examination, she testified that she “probably heard
 20 gossip” about union activities before she fired Radder, but “I mean I didn’t [know] Jan, specifically, was involved,” and that she had learned about his union involvement “because of the newsletter” which she saw “around the first part of May,” as discussed in subsection H below.

Yet, during that same direct examination, Hengemuhle allowed that, “I had heard from
 30 staff that they had been approached in their work station in regards to signing a card.” The “they” became a “he” during cross-examination when she testified that she had heard about the union activity from “Cedric Stanford, my receptionist,” and, contradicting her above-quoted denial during direct examination, she admitted that, “Yes,” she had heard prior to Radder’s discharge that he had approached staff members at their work stations about signing
 35 authorization cards.

Turning to the circumstances of Radder’s termination on March 7, one of Respondent’s most important rules is that staff members not be alone with a child. Thus, two teachers are assigned to each classroom, though sometimes it is a driver or advocate who will take the place
 40 of the second – head or assistant – teacher. Before one of them leaves the room arrangements must be made for ensuring that the remaining staff member is not left alone with the children – even if that means that the remaining staff member must move to the hallway outside of the room, continuing to observe the children through the open classroom door, while being observed continually by a teacher or other staff member from another room, such as the
 45 room across the hall. There is no challenge to either the existence of that rule, nor to its importance in the context of Respondent’s operations.

On March 7 Hengemuhle encountered Radder, unaccompanied by any other staff member, walking two children down the hallway to the bathroom. She questioned the fact that he was alone with children and accompanied him to the bathroom. When the children were finished there, Hengemuhle began walking back to the classroom with the three of them. Later that day, Radder was summoned to Hengemuhle’s office where, in the presence of McKnight

Center Supervisor Cindy Casalenda, an admitted statutory supervisor and agent of Respondent, he was fired.

As to Radder's discharge, allegedly for a motive unlawful under the Act, he was given a "MEMO" from Hengemuhle, "**RE: Violation/Agency Policies/Procedure/Termination**," stating in pertinent part:

Today, I observed you alone with 2 children in the hallway. I spoke with you regarding agency policy which strictly prohibits anyone being alone with children.

You received a Memo previously, dated January 14, 1997, regarding failure to adhere to agency policies and procedures (copy attached).

Based on continued failure to adhere to agency policies and procedures, your employment with this agency is terminated effective immediately.

Radder denied that prior to March 7 he had even seen the above-referenced January 14 memo.

Nonetheless, one was attached to Hengemuhle's March 7 memo. That January 14 memo is directed to Radder from then-Center Director Sloan. It concerns the subject of "Health, Welfare, Safety," and states:

An incident has been reported to me involving the health, welfare and safety of a child under your supervision. This is the second incident in a two week period where children have sustained a head injury.

Supervision of children and safety are considered to be major concerns for all staff employed by PICA and failure to observe established policies regarding either is grounds for immediate disciplinary action.

Any further incidents will result in appropriate action which could include unpaid suspension, probation and/or termination.

The January 14 memo is of note for two reasons. First, its issuance has been alleged to have been unlawfully motivated and, thus, to be an independent violation of Sections 8(a)(3) and (1) of the Act.

Second, Hengemuhle testified that Radder would not have been fired on March 7, for being alone with children, had the January 14 memo not existed: "my intent was to probably either to put him on probation or suspend him for three days, which is normal practice," but "after I saw the memo and the seriousness of the warning memo of January 14th I felt that he was showing examples of not using sound judgments -- judgment when he dealt with children and their health, welfare and safety, and I wasn't comfortable with having him in my facility." Thus, it is to that January 14 warning memo that attention should first be directed.

By way of background, as might be expected child injuries are not uncommon at Respondent, though there are some variances in estimates as to their exact frequency. Employees are informed during first aid training, and possibly also during orientation, that whenever a child incurs an injury, be it a minor one like a scratch or bruise or a major one such as head trauma, the employees are responsible for first ascertaining the nature of the injury and, then, for treating it or, if it is more serious, for summoning emergency services. In addition, three written records about an injury need to be made.

First, what is called an Incident Report (see General Counsel's Exhibit Number 57 for examples) must be prepared and submitted to the center director at whose center the injury occurred. Eventually, incident reports are entered into Respondent's database. Second, an injury report is written up for delivery to the child's parent or guardian. Injury reports are not transmitted by mail, but instead are delivered to the parent or guardian by a staff member, frequently the driver on that child's bus route. If the injury is major and requires transportation of the child to a hospital, however, effort is made to telephone the parent, guardian or other responsible relative. Thirdly, the injury is recorded in the classroom log, referred to as the white book. All three of these reports are to be completed on the same day as the injury occurs.

As to who is responsible for doing so, no question a head teacher would be obliged to tend to a child injured in her/his classroom and for preparing those reports. So, too, would be any other staff member – assistant teacher, driver, advocate – who is present when an injury occurs. When more than one staff member is present when an injury occurs, assistant teacher Vivian Bullock testified that she thought the reporting responsibility to be that of the staff member who "witnessed it." Radder testified that he would prepare an incident report of any injury in his classroom that he had observed or that had been reported to him by his assistant teacher.

Perhaps the official most knowledgeable about the subject of child injury is Health and Nutrition Assistant Townsend. She testified that, as a general matter, it is the responsibility of a teacher to investigate immediately whenever there appears to be a classroom injury and, also, to document it. But, as had Bullock, Townsend also testified that as to filling out an incident report concerning an injury, the responsibility is that of "[t]he person who observed the injury."

Which leads back to Radder. He had been hired by Respondent as a head teacher during March 1997 and had worked continuously for it thereafter until he was discharged on March 7. From December 12, 1996 until March 4, 1997 there were six child injuries to which Radder had at least some propinquity. On December 12, according to the Incident Report prepared by Radder, a child was injured "playing with a ball another child wanted. The other child swung his arm out and scratched the child on the chin." The injury is listed as a "minor" one and, in addition, as an injury to the "Face," but not to the "Head" on the incident report.

On the following day – Friday, December 13 – Radder's class and another one were combined, because Radder's assistant teacher was absent, and were going on a field trip. As the children were getting onto the bus at McKnight Center, one of the three-year old children tripped on the bus and struck her head on the interior wall of the bus, suffering a cut above her right eyebrow. In the process of treating the wound, Radder determined that it required stitches. He and the driver took his class back to his classroom. He spoke with his center supervisor, Cindy Casalenda, telling her that he thought the child needed to be taken to Hennepin County Medical Center for examination by a doctor. At Casalenda's direction, he tried to contact a parent at the child's home, but his telephone call was not answered. So, Casalenda said that she would watch his class while he and the driver took the child to the medical center. Interestingly, there is no evidence that Casalenda made any effort to tend to the child's injury or, even, that she went to see the child to ascertain the extent of the injury.

The driver and Radder took the child to the medical center. On the way they stopped at the child's home, but no one was there. At the medical center both waited until Radder and the child were taken to a room where a nurse and, then, a doctor tended to the child's injury. In the meantime, the driver returned to McKnight Center, to transport the second class for which he was responsible. Radder contacted Casalenda to let her know that the child had been treated

and that he needed to have the driver pick them up. When he arrived to do so, the driver told Radder that Casalenda had said that Radder should write a letter to the parents about the injury. Radder did so as the bus traveled from the medical center to the child's home. Again, no one was there and Radder left his letter on the door.

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They arrived back at McKnight Center shortly before the children were to be dismissed for the day. Casalenda asked how things had gone and said that she would continue watching Radder's class while he filled out the incident and injury reports. Then, they waited for one or both of the child's parents to arrive. As they did so, it is uncontested, Radder mentioned to Casalenda that he was upset about the incident, but she said only, "You know, accidents happen. You did everything you could do."

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So far as the record discloses, no disciplinary action was taken, nor even warned, against Radder as a result of the December 13 injury. No further injuries occurred during the brief period before Winter break started on December 20. The Staff Master Calendar for January 1997 shows that classes were scheduled to resume on Tuesday, January 7. On Wednesday, January 8 a child incurred a minor injury – a bump on his head – in the classroom where Radder was head teacher and Bullock assistant teacher. That is the injury which assertedly underlies the January 14 warning memo.

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Bullock had been serving as assistant teacher in Radder's classroom during the 1996-1997 school year. She had worked as an assistant teacher for Respondent for approximately two months during 1994, but had resigned. Thereafter, she substituted as an assistant teacher, on an on-call basis, during the 1995-1996 school year. Before the 1996-1997 school year began, she was again hired as an assistant teacher. Apparently she underwent CPR training during the pre-school period, inasmuch as she is not mentioned on any of Townsend's Medical Component MEMOs listing employees scheduled for that training. She was among the employees listed for first aid training on Saturday, November 16. Apparently, she attended that training, thereby satisfying her first aid training requirement. For, she is not listed among employees whom Townsend, by Medical Component MEMO dated November 19, 1996, identified as having failed to show up for that training. Nor does Bullock's name appear on any of Townsend's subsequent first aid training lists.

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On January 8 Radder and Bullock were assisting the children to get ready to go home, either on Respondent's bus or with parents or persons authorized to pick them up. Radder and Bullock were approximately ten feet apart in the classroom, each working with a different group of the 17 total children then in that classroom. One of the children in her group, testified Bullock, "was playing and he would bump me and fall on the floor and then jump back up. Well, this time he bumped me and he fell on the floor," rolling toward a shelf on which he struck his forehead. According to Bullock, "I picked him up off the floor and asked was he okay and when I put him down somebody was there to pick him up at the door so he just went home." Asked to describe her observation of any injury to the child's forehead, Bullock testified, "Just a little pin dot on his head."

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Radder testified that, as he was helping a child in the other group put on a jacket, he had heard the child with Bullock crying, though he had not seen any injury occur. He testified, however, the child "was with Vivian" and she appeared to be "handling the situation," by "comforting" him. That is, testified Radder, "I saw that Vivian was with the child and assumed that if she was with the child that she was talking care of whatever had happened." In that connection, Radder testified that, while he knew that Bullock was then a probationary employee, "Vivian had the same first aid training that I did and would be able to take care of the situation as well as I could."

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Neither one of them prepared an incident report on January 8. As to that, Radder explained, “first I did not know the incident occurred until the day after and, second, I had not witnesses [sic] the incident so I could not fill out the incident report knowledgeably.” With respect to that first reason, it is not contested that crying children are not uncommon at Respondent. But, injury is only one reason for them to do so. As to Radder’s second reason, Bullock agreed that she should have been the one who completed an incident report about the January 8 accident, “because I witnessed it.”

Respondent acknowledges that it had been that injury and the events surrounding it which formed the basis of the warning memo issued to Radder and bearing the date January 14, 1997. Yet, the record is not clear as to which official actually made the decision to prepare that memo. Of course, that is a central consideration when evaluating allegations of discrimination. “The state of mind of the company officials who made the decision ... reflects the company’s motive for” allegedly discriminatory action. *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 336 (5th Cir. 1980). See also, *Advanced Installations, Inc.*, 257 NLRB 845, 854 (1981), enfd. mem., 698 F.2d 1231 (9th Cir. 1982).

Sloan, the official whose name appears on the warning memo, testified that, before having issued it, she had conferred with Director of Operations Baker and, then, with Director of Human Resources Leslie Ann Karos. Neither Baker nor Karos appeared as witnesses. So, there is no testimony by either that she had made the decision to issue the January 14 warning memo to Radder. Furthermore, Sloan never claimed that either Baker or Karos had actually made the decision to issue that warning memo. But, in reality, Sloan never actually testified that she had made that decision.

Instead, Sloan testified merely that she “had shared the information” disclosed by her investigation, of what had occurred in Radder and Bullock’s classroom at the end of the school day on January 8, “in the appropriate channels that would, again, start the process on the procedures toward an action such as” the warning memo. At that point, she identified only Karos from whom, testified Sloan, she had received the written warning memo. During cross-examination, Sloan testified that she also had spoken with Baker before having spoken to Karos. No evidence was adduced concerning that conversation with Baker, aside from the fact that Sloan would not have then spoken with Karos had Baker said that was not necessary. Still, as pointed out above, Sloan never claimed that Baker had been the official who made the decision to prepare the warning notice to Radder.

Beyond that, Sloan testified that, after having received the warning memo prepared by Karos, or by someone in human resources, she (Sloan) had “checked it over to see my recollection of the incident, the investigation of the incident, was this, you know, an appropriate read of the matter, and, yes, I say that it is.” Thus, whether she was testifying that she had actually recommended issuing a warning memo to Radder, or had merely reported facts which

Baker or perhaps Karos decided warranted issuing a written warning, when Sloan testified "I activated the memorandum," she clearly did stand behind the wording appearing on it.

With regard to events between the January 8 injury and Sloan's asserted receipt from human resources of the memo, Sloan testified that she first had learned of the accident when she received a telephone call from the injured child's parent. She returned that call and was told by the child's grandparent "that a child had been injured under Jan's care, with a head injury, and there was not the proper documentation to support that." According to Sloan, she spoke with Casalenda who said that "she, too, had received a call from the parent, and had found out that there was no documentation for the injury that was sustained by the child." Sloan testified that she directed Casalenda to investigate what had occurred.

Sloan never did testify as to what had been reported to her by Casalenda after the latter had conducted that investigation. But, Sloan did claim that, before the warning memo to Radder had ever been prepared, she had met in her office with Radder, Bullock and Casalenda: "we talked about the inappropriateness of the injury itself, and then, certainly, not having any documentation for the injury, and that as head teacher, Jan Radder would receive some disciplinary action," testified Sloan during direct examination. At that point, Sloan emphasized, "behind this matter again there was not any documentation supporting the child's sustaining the injury."

During cross-examination, she essentially repeated her above-quoted description of what had been said during that asserted meeting with Radder, Bullock and Casalenda:

In that meeting was discussed, again, the importance, the impact, of the incident which had happened with the child, and how it being inappropriate and could never happen again. And how with both staff people present it was unfortunate that this had happened, there was not the documentation, the parent had informed me -- anyway we went through this entire process. After coming out of that process, again, the thing was it should have never happened. It can never happen again. And that we had things into place and therefore the staff were going to be basically warned in some manner in regard to a disciplinary action that -- you know, that it could never happen again, and it was inappropriate.

According to Sloan, thereafter she received and reviewed the warning memo, after which, consistent with Respondent's normal procedure, she showed it to Casalenda, who also read it. Sloan claimed that she "gave the [warning] to Cindy Casalenda," so that the warning "goes out from there * * * [t]o the individual."

The reliability of Sloan's above-described account, however, is diminished objectively by a series of inconsistencies between it and other evidence presented. In the first place, not only did Casalenda not corroborate Sloan's account that the warning memo had been given to her (Casalenda) to, in turn, give to Radder, but Casalenda testified that she was "not aware" of whether Radder even had received it. "Reason being the next two days [after January 14] I had missed -- I wasn't at work," testified Casalenda. Thus, Radder denied having received the warning memo prior to March 7 and Respondent presented no particularized reliable evidence refuting that denial.

In that regard, Casalenda made an effort to supply testimony seemingly intended to buttress Respondent's defense that Radder had known during January about the warning's content, as opposed to having actually received the warning memo during that month. In the end, however, all that developed from that effort was an internal contradiction in Casalenda's

own testimony. During direct examination she was asked if she was aware of whether Radder had the contents of the warning memo communicated to him orally during January. "Yes," she answered. Yet, asked during cross-examination who had orally communicated the contents of that warning memo to Radder, Casalenda answered, "I do not know. I wasn't here. Like I said I missed a couple days." Asked next how she had known the warning's contents had even been communicated to Radder, Casalenda completely contradicted her "Yes" answer during direct examination by responding, "That I do not know. I don't know if it was communicated to him."

Second, Casalenda never corroborated Sloan's above-quoted testimony about a meeting of those two supervisors with Radder and Bullock. The two employees each denied having been spoken to by Sloan about the January 8 injury. Casalenda was asked about having attended a meeting between Radder and Sloan, as the latter claimed Casalenda had done, when Sloan had communicated that there would be discipline for the circumstances which came to be enumerated in the warning memo. "Yes," answered Casalenda.

She repeated that answer during cross-examination, but then became extremely vague about such a meeting's content. Asked about when that had occurred, Casalenda testified, "It was around the 9th, 10th. I'm not sure of the date. The 10th, 11th." Fair enough. But, asked next where she had been when that had occurred, Casalenda responded, "I vaguely remember we had a -- we had a discussion about it," and, then, "I vaguely remember having a meeting." Eventually, she sort of supplied a "where" for that meeting: "In her office, I guess." Yet, then asked for her account of what had happened during it, Casalenda testified, "I said I don't -- I said I vaguely remember it, okay? I can't get into details I don't know" and, ultimately, "I just vaguely remember being in her office."

Putting the best face on the matter for Casalenda, her lack of recollection might be understandable had she regularly participated in center directors' meetings with employees about parent complaints. Asked at the outset if she recalled having received any call from a parent or guardian with a complaint, however, Casalenda responded, "Actually just one that I can think of," and specified the call about the January 8 accident. Seemingly, therefore, that had been a unique occurrence. Accordingly, it seems peculiar that an apparently perceptive individual such as Casalenda would be so lacking in recollection about events emanating from it. In the final analysis, it appeared that Casalenda was trying to support Respondent's overall defense without, at the same time, giving any testimony that might be inconsistent with it and, more particularly, without saying anything that might be inconsistent with the account which Sloan would be testifying had occurred in connection with the memo's issuance.

Third, it seems odd that, had a warning been prepared for Radder on January 14, it would not have been given to him, in view of what happened to Bullock. Casalenda testified that, "I gave her a speed memo" concerning the unreported January 8 accident. In fact, Radder's testimony tended to corroborate that of Casalenda: "Vivian, I believe, told me about it that she'd received a speedy Memo," which he described, without contradiction, as "sort of like a verbal warning * * * usually saying to improve such and such." Now, if, despite her two days off after January 14, Casalenda still had the opportunity to give such a memo to Bullock, it seems inconsistent with those events that she would not also have had a similar opportunity to give the warning memo to Radder -- had one then existed.

Fourth, based upon the descriptions of Sloan and Casalenda, distress about the January 8 accident appears to have arisen at least as much from the absence of incident and injury reports concerning it, as by the fact that an accident had occurred. Even so, though Sloan asserted that she had checked over the warning memo upon receiving it from human

resources – “to see my recollection of the incident, the investigation of the incident, was this, you know, an appropriate read of the matter” – the memo, itself, makes no specific mention of Radder having failed to prepare incident and injury reports.

5 To be sure, the memo does mention “established policies”. But, that vague phrase appears in a sentence which begins with a statement about, “Supervision of children and safety”. In context, “established policies regarding either” appears to pertain to “Supervision of children and safety,” rather than to any failure to complete incident and injury reports. Like Casalenda, Sloan appeared to be an intelligent individual who, while testifying, seemed to have
10 no difficulty expressing her thoughts. Surely, had “established policies” actually referred to failure to complete those reports, Sloan, and Respondent’s human resources department, would seemingly have had no difficulty saying so, plainly, instead of utilizing vague and ambiguous language.

15 Of course, from what has been discussed above, Bullock appears to have been the natural staff member to complete those reports, since, so far as the record shows, she had been the lone staff member who actually had witnessed the child being injured, by bumping his forehead against the shelf. Thus, to accuse Radder in writing of having failed to prepare incident and injury reports about the accident would be to make a specific statement that,
20 pursued beyond a superficial level, would have been at odds with Respondent’s own procedure and practice as described, for example, by Townsend.

Fifth, further problems for Sloan’s testimony emerge from the warning memo’s attribution to Radder of some deficiency in connection with the first of supposedly “the second
25 incident in a two week period where children have sustained a head injury.” Both Sloan and Casalenda admitted that the first incident, to which the warning memo impliedly refers, had been the above-described December 13 injury to the child getting on the bus. However, asked if her assessment had been that Radder had done everything that he could and should have done at that time under the circumstances, Casalenda answered, “Yes.” And she conceded
30 that she had communicated as much to Sloan.

When Sloan was asked if Radder had inappropriately jeopardized that child’s health or safety while in the process of ensuring that children got on the bus, Sloan admitted, somewhat grudgingly it appeared, “In that incident I do not remember that to be true.” Indeed, not only did
35 Respondent not discipline Radder following that incident, but Sloan admitted that she had told him, in the course of reviewing with him what had taken place, “well it looks like you did everything you were supposed to, you reacted the way a good teacher is supposed to react and handled it very well.”

40 Sixth, as quoted above, the warning memo states, “Any further incidents will result in appropriate action which could include unpaid suspension, probation and/or termination.” Had that memo been issued on January 14, and had Respondent at that point truly been concerned about injuries to children under Radder’s care, especially head injuries, presumably it would have undertaken some discipline of Radder for one or more of the three injuries reported by
45 Radder after January 14.

On January 23 he prepared an incident report concerning a minor injury suffered to a child who cut her upper inside lip when she fell while running. True, that was not necessarily regarded to have been a head injury. But, on January 29 Radder submitted an incident report concerning a minor head injury suffered when a child’s untied shoelace caught under a large toy in the gym while running, causing him to fall and hit his head on the floor. Though the injury was a minor one, the circumstances of that accident bear some similarity to the December 13

injury – a child fell and struck his head. Finally, on March 4 Radder submitted an incident report concerning a child's cut inside lip, incurred when that child was accidentally kicked in the mouth by another child. Yet, not only is there no evidence of any discipline for any of these injuries nor for their collective occurrence, as was warned would occur in the memo dated January 14, 1997, but there has been no showing that Radder's center supervisor or center director even spoke with him about any of those post-January 14 injuries incurred by children.

It cannot legitimately be argued that a head injury to a child is *not* a serious matter. Even so, they are not uncommon at Respondent, as shown by review of its incident reports for the 1996-1997 school year. In fact, such injuries occurred on more than one occasion during that school year to children under the care of other staff members. In addition to the incident on January 8, another child under Bullock's care suffered what is listed on the incident report as a head injury on March 20. Of course, more than two months separate those two injuries and, moreover, Bullock is an assistant, not a head, teacher. Nonetheless, a child under head teacher Jensen's care suffered a head injury on February 21 – while in the bathroom – and another child in her care suffered a head injury – while in the large muscle room – seven days later, on February 28. But, so far as the record shows, Jensen received neither warning nor other discipline as a consequence of that second head injury, despite its proximity in time to the earlier one.

Turning to the events of March 7, the essential facts are uncontested. Respondent has a rule, the validity of which is not disputed, requiring staff not to be alone with children. Radder left the high five classroom to take two children to the bathroom, without ensuring that someone was with him or watching him as he walked in the hallway with them. Assistant teacher Karen Allen had been in the high five classroom at approximately 10 a.m. when Radder had left with the children. He told her that he was taking the two children to the bathroom. Interestingly, there is no evidence that Allen took any action at that point to ensure that she would not be left alone with the classroom of children – such as stepping into the hallway to watch the children in the room through the classroom door to the hallway. Equally interesting, there is no evidence that Hengemuhle or any other supervisor thereafter made any effort to ascertain what Allen had done, if anything, to ensure that she had not been left alone in the classroom with the children, after Radder had left with two of them.

To get to the restroom, Radder walked the two children along McKnight Center's 100 Wing hallway to the point where that wing intersects with another wing, the 200 one. After making a turn at that hallway intersection, the restroom is reached by walking a short distance along the 200 Wing from that intersection. Of course, as described above, by the time that Radder and the children reached the hallway intersection, they had been joined by Hengemuhle.

At the place where those hallways intersect is located what was termed a reception cubicle, consisting of head-high wood particle board which surrounds it, but is broken by two glass doors. As he had left the high five classroom with the children on March 7, Radder testified, he noticed the receptionist, Cedric Sanford, in that cubicle and, within arm's length of the cubicle, an advocate talking to another person. As will be seen in subsection H below, Hengemuhle would later tell Jensen that she (Hengemuhle) had seen at least Sanford in the cubicle, adding that he had not been watching Radder. Radder confirmed that testimony: "He may have been facing the advocate and the other person or he may have been facing out towards Third Avenue," but in either event, Radder admitted that he had no knowledge that any of those three individuals had been watching him as he started walking the children along the 100 Wing hallway, toward the hallway intersection.

As set forth above, Hengemuhle admitted, eventually, that by March 7 she had learned from receptionist Sanford that Radder had been approaching staff members to solicit their signatures on the Union's authorization cards. On March 7, following her encounter with Radder and the two children, Hengemuhle testified, "I talked to Cindy Casalenda, his supervisor," relating the encounter with Radder and Hengemuhle's perception that Radder had "acted as if the rules didn't apply to him," adding, "we were going to have to take action." According to Hengemuhle, at that point she told Casalenda "you're going to have to talk to him and we're going to have to do something."

That such a conversation did occur between Hengemuhle and Casalenda, in the wake of the former's encounter with Radder and the children, is shown by Radder's testimony. He testified that later Casalenda had come to the high five classroom to deliver something. While there, testified Radder, he informed Casalenda of his "run-in" with Hengemuhle and, he testified, Casalenda replied, "yeah you know you're not supposed to be alone with kids, and I said, well I wasn't. There were people in the hallway and Cindy left."

After speaking with Casalenda, Hengemuhle testified that she had tried to call Director of Operations Baker, who was not then available, after which she telephoned Director of Human Resources Karos. During that telephone conversation, according to Hengemuhle, she reported to Karos having "encountered Jan in the hallway with children, and -- and that I needed to take a disciplinary action." Karos "pulled up" what was in Radder's personnel file and, testified Hengemuhle, "told me well Jan has a memo, a warning memo, already in his file and so I asked her to fax that memo over to me so I could take a look at it." Hengemuhle testified that Karos had done so.

As quoted at the beginning of this subsection, Hengemuhle further testified that upon reading it, "I wasn't comfortable with having him in my facility" any longer. She again tried to contact Baker, this time succeeding and describing to Baker what she had seen Radder doing earlier that day and raising the subject of the warning memo. Hengemuhle testified that she told Baker "that I wanted to terminate his employment effective immediately," to which Baker responded, "you have to do what you have to do."

Hengemuhle testified that Karos had been scheduled to come to McKnight Center later on March 7 for a meeting. Along with her, Karos brought over the finalized copy of the above-partially quoted termination letter and attached January 14 warning memo, as well as Radder's final paychecks. Then, Hengemuhle and Casalenda met with Radder near the conclusion of the school day and fired him.

Consistent with Respondent's defense, Hengemuhle told Radder that when she had encountered him earlier in the day that he "had looked at her as if she was crazy," and that she was "terminating [his] employment with this agency effective immediately," explaining in response to his question, "for being alone with children and jeopardizing policies and procedures." She handed him the termination notice and attached warning memo. He said that he had never seen the latter. She said that while it had been issued before she had become McKnight Center director, it was in his personnel file and, therefore, she had to assume that he had received a copy of it.

Casalenda interjected that Sloan had spoken to her about the January 8 incident and had said that she (Sloan) intended to give Radder a warning memo concerning it, adding that since nothing more had been said about such a memo she (Casalenda) either forgot about it or assumed that Radder had no problems with it. Hengemuhle said that she heard that Radder was a good teacher and she had no complaints about him, pointing out that he could file a grievance under Respondent's internal grievance procedure. Radder said that he did not have

a current year's handbook, in which that grievance procedure would appear, and Casalenda said she would get him one. In fact, after the meeting ended, Casalenda and Radder went to the office where she gave him a copy of the handbook.

5 Certain other conversations are significant in connection with the above-described termination meeting. Before it occurred, Hengemuhle had told Casalenda to bring Radder to the small conference room adjoining Hengemuhle's office. In the process of instructing Casalenda to do that, Hengemuhle testified during direct examination, "I might have told her that I was terminating him. And -- I said to her that I'm going to terminate Jan today effective
10 immediately and will you go get Jan?" During cross-examination Hengemuhle embellished that account, testifying that Casalenda had asked "how come, and I said, because he had a previous memo in his file," and, further, "I asked her if she wanted to be the one to do it," but Casalenda did not respond to that question.

15 In view of the foregoing testimony showing that Casalenda assertedly had known before Hengemuhle's meeting with Radder that the latter was to be terminated, it comes as somewhat of a surprise that Radder testified that, following his termination meeting and after her departure from Hengemuhle, Casalenda had said to him "this was a big surprise to me. I didn't expect this to happen." Casalenda appeared as a witness for Respondent. Yet, she did not deny
20 having made those remarks to Radder.

Nor did she dispute his account that, while in her office getting a handbook for him, he had "said to her, you know why they fired me, don't you? It's because I'm the main organizer for the union, and Cindy replied, I can't talk about that because of my position as a supervisor, just file the grievance." Questioning during cross-examination led Radder to testify that, by her
25 remark to him, Casalenda seemed to be saying that he "should", as opposed to "could", file a grievance. Still, he never did so.

In contrast to her failure to deny the above-quoted remarks attributed to her by Radder, Casalenda did give testimony about a conversation with head teacher Merrilene Jensen early on Monday, March 10. Based upon Jensen's version of it, there is an allegation that Casalenda threatened that Jensen might lose her job because of her union activities.

35 According to Jensen, a coworker had said something that led her to, at least, believe that she might also be fired. That, and a direction by receptionist Sanford to move her car from the front parking lot, led Jensen to Casalenda's office where Jensen asserted that Radder had been terminated and that she had heard she would be next. Jensen testified that Casalenda responded, "If you feel that way then cover yourself," to which Jensen said, 'Well, you know, given the circumstances and with my involvement the same as Jan's as far as being in the
40 [U]nion there might be a possibility I might be asked to testify at some point or provide information[.]' To that, testified Jensen, Casalenda replied, "Jan is not here any longer. You are. You need to think about where you want to be a year from now or five years from now."

Casalenda agreed that she had spoken with Jensen, but denied that she had threatened
45 Jensen during that March 10 conversation. Casalenda agreed that Jensen had started their exchange by saying "she was next" and, also, had said, "I'm part of the union organizing, and I'm going to be getting fired or terminated for being involved." In response, testified Casalenda, "I told her that if she's, you know, following policies and procedures there's nothing that she should worry about. If she's doing her job." Thus, in essence, Casalenda was testifying that she had said no more than that Jensen should not worry about her job, so long as she did it properly. And Jensen agreed that such a message had been conveyed by Casalenda, who was "supportive of me as a teacher." "Basically just don't give them a reason to -- for me to be

next, for me to be fired,” Jensen testified that Casalenda had been saying.

Yet, during cross-examination, Jensen repeated the above-quoted exchange about having said that she might have to testify in the future and about Casalenda having replied that Radder “is not here any more,” and, “You need to think about where you want to be in a year from now or five years from now.” Casalenda never disputed that such an exchange of remarks had been made as part of her March 10 conversation with Jensen.

Feldman testified that, in the wake of Radder’s conversation, he had engaged in several conversations with Glendale Center Director Hockert. As will be seen in the immediately succeeding subsection, those conversations culminated in one which occurred on March 19, when Feldman revealed expressly to Hockert that he was supporting the Union. Hockert never denied that such conversations with Feldman had occurred, nor did she contest anything which Feldman testified had been said during them. As a result, it is uncontroverted that when Feldman said to her that he believed that Radder’s discharge had been “bogus,” Hockert had replied, “You know he was out of line.” To that assertion, Feldman testified that he had responded, “Marilyn, you know that, you know, he didn’t do anything that a lot of other people haven’t done before.” At that point during his conversation with Hockert, testified Feldman, a teacher came along “with about four children right behind” and he said, “Look Marilyn. There it is right there. It’s the same thing.” According to Feldman, Hockert said nothing negative to that teacher, but merely spoke with the teacher and the children.

In that connection, Michelle Knox, a witness for the General Counsel, testified, “when you work at [Respondent] it’s written anywhere [sic] and it’s said over and over and over again you cannot be along [sic] with a child or you will be terminated. It’s even in the contract when you get hired. And they tell us time and time and time and time again when they see us in the hall or, you know, that’s one thing they don’t play about.” Even so, Radder claimed that his March 7 trip to the bathroom with the two children had not differed from similar trips which he had made there with children on earlier occasions. Beyond that, Jensen described an incident when head teacher Amy Timander’s assistant teacher had to leave work abruptly and Timander had been left alone with her class for a couple of hours, though Casalenda had popped in and out of the room during that period, until someone else could be located to remain in the room with Timander. Casalenda did not dispute Jensen’s testimony.

Nor did Casalenda dispute testimony by Bullock concerning an incident, about a week after Radder had been fired, when she entered the bathroom and discovered Casalenda there alone with a child. Also not to be overlooked in this connection is the testimony of Health and Nutrition Services Assistant Townsend, quoted in subsection E above, that, State licensing requires ... to be certified ... *anybody who would be alone with the children*” (Emphasis supplied.)

To be sure, Respondent has a longstanding rule prohibiting staff from being alone with children. But the foregoing testimony is some evidence that Respondent recognizes situations do occur when staff will be alone with children. Despite Knox’s above-quoted testimony, there is no evidence that, in practice, Respondent has applied that rule so rigidly that employees violating it have been discharged. To the contrary, no evidence has been presented of any situation where an employee, other than Radder, has been discharged for violating that rule. Indeed, Hengemuhle admitted that Radder would not have been discharged on March 7, but for the supposed discovery of the warning memo dated January 14, 1997.

G. Transfer of Brett Feldman to Fraser Center

Brett Feldman began working for Respondent as a parent-child advocate at McKnight Center during January of 1995. During the following August Glendale Center opened. In response to his initiative, Respondent transferred Feldman there and reclassified him as receptionist/records clerk in the clerical component. He remained employed at Glendale Center through April 28, 1997 when he was transferred to Fraser Center. That transfer is alleged to have been motivated by considerations unlawful under the Act.

As described in subsection B above, Feldman had become involved in the Union's campaign upon discovering a group of the Union's December flyers, announcing the McRae Park meeting, and attached authorization cards by the computer at his work station. That discovery, and subsequent investigation into unions, led him to become an activist for the Union, he testified.

As also described in subsection B above, Feldman claimed that, during December, Glendale Center Director Hockert had told him to "stay out of trouble" and "don't get involved and not to talk about the [U]nion at work whatever" he did. As discussed in the immediately preceding subsection, after Radder had been terminated Feldman discussed with Hockert his perception that that termination had been "bogus." By March 19, he testified that he had decided to reveal specifically to Hockert that he was supporting the Union: "instead of just implying I wanted to just come out and say it."

He testified that, during the evening of that day, he returned to Glendale Center after having helped familiarize a new records clerk at Northeast Center with certain aspects of the computer there. Upon returning, Feldman testified, he told Hockert that he felt there needed to be a union and he intended to do whatever he could to unionize employees at Respondent, that he "tried to morally justify it to her why I thought it was needed", that he had heard rumors that he and one or two other employees were "going to be next" to be discharged, and that he "would understand if she was put in a position to have to terminate" him, but if that happened, he "would do anything in my power to defend my credibility" and "would fight with everything that I had because to me it was just about exercising my democratic right and I wasn't out to try to hurt anybody."

According to Feldman, Hockert "said that she understood what I was saying, that she sympathized with me, but to stay out of trouble." That is, testified Feldman, she "again pleaded with me to just stay out of trouble. Please don't do this. Just stay out of trouble."

As pointed out in subsection B above, Hockert acknowledged that Feldman had spoken to her frequently about the Union. She never denied with particularity having participated in the above-described conversation, nor did she deny that Feldman had made the above-quoted remarks to her and she to him. Instead, asked if there had been a long conversation between them during which Feldman had been justifying why he thought a union would be good for Respondent, Hockert answered merely, "I do not remember that conversation [a]t all."

During direct examination Feldman explained what had happened from Monday, April 28 into the following Summer. During mid-afternoon on April 28 he was told by Glendale Center Director Hockert that he "might be going to Fraser facility to break -- or to cover for Mary Smith, the records clerk there, while she went on vacation." By the end of the day, that transfer had been confirmed.

Feldman reported to Fraser Center the following morning. There, he met with Smith who informed him "what exactly she wanted me to do in her absence." She gave him her computer database password, "said to do everything but to drop children or add children. Just

don't -- don't mess with her enrollment", and cover for the receptionist during the latter's morning and afternoon breaks and lunch period. Feldman followed those instructions during Smith's vacation. In addition, he brought over software from Glendale Center "so I could perform my Glendale work as well. I did PO's [purchase orders] for Glendale." After the first three days he was relieved of having to cover when the receptionist took breaks and went to lunch.

On Friday, May 9, continued Feldman, a Glendale teacher told him, "You're right. You're not coming back -- you're not coming back to Glendale." Those remarks were based upon a Glendale work schedule which the unidentified teacher assertedly had seen and which showed that other people would be doing Feldman's job at Glendale Center. However, no work schedule or Glendale teacher were produced to corroborate that testimony by Feldman.

According to Feldman, he had been concerned about being left at Fraser Center from the time he had been notified of his transfer there on April 28: "before I left Glendale I told people that I didn't think I was coming back." After the teacher's asserted May 9 reports, Feldman testified that he called Hockert to ascertain if he was to remain at Fraser Center, but at that point she was unable to give him an answer. When he saw her at Fraser Center on Monday, May 12, Hockert said that she would be speaking with Director of Operations Lucia Rangel. Later that day she told him to telephone her that evening. When he did so, Hockert told him "that I was going to become the permanent Fraser records clerk and that Mary [Smith] was going to be taking a new position as a computer -- helping the computer person create a new data base."

Smith returned on Tuesday, May 13, testified Feldman, and she began working again at her desk on which the then-lone Fraser Center computer was located. That left him sitting in a chair at another desk behind Smith, doing nothing. But, around noon Rangel asked to speak to Smith and, afterward, spoke with Feldman. Rangel told him that he would be the records clerk at Fraser Center, but would not have to cover phones, and that she would be his immediate supervisor. She also said that Smith "was going to take a new position assisting the computer [p]rogrammer, with the creation of a new database that was actually going to be unveiled on May 19th," with school registration to start on May 27. He asked if he could return to Glendale Center to clear out his personal belongings; Rangel said that he could do so.

Without regard to what Rangel had said, Feldman testified that when he returned to the front office, Smith continued to sit at the desk with the computer, leaving Feldman with no choice but to continue sitting at the desk behind her. "I just sat there," testified Feldman, while Smith worked on the computer and answered the phone. In fact, he claimed, Smith continued to enter data on the computer as a records clerk, "[u]ntil she was told that she wasn't supposed to be at that position any more," on a later date.

On May 14 Feldman took personal leave, due to a death in his family. He did not return to work until Monday, May 19. That afternoon he went to Glendale Center to pick up his personal belongings. There, he encountered Marilyn Hockert and they engaged in a conversation during which, it is alleged, she unlawfully threatened that Respondent wanted
 5 Feldman to quit. That conversation is discussed below.

Continuing the sequence of events, Feldman returned to Fraser Center where he worked through the summer. He testified that before the end of the school year on June 13, he saw a list of Fraser Center employees which had been posted. His name was on that list as
 10 "clerical"; "Records clerk" was printed by the name of Mary Smith. However, that list was not presented during the hearing. At the beginning of the 1997-1998 school year, Feldman was transferred back to Glendale Center where, so far as the record discloses, he resumed performing his job there as receptionist/records clerk.

The General Counsel encounters heavy going in trying to show that Feldman's transfer to Fraser Center had been unlawfully motivated under the Act. Indeed, aside from arguing generally that his status at Fraser Center had been "inconsistent with a legitimate job transfer" (footnote omitted) and had been "pretextual," no specific argument is made connecting those
 15 conclusionary generalizations to a specific antiunion purpose for having transferred Feldman to Fraser Center during Spring and Summer. The closest the evidence comes to revealing any such specific purpose is Feldman's testimony concerning his conversation with Hockert on May 19, when he had returned to Glendale Center to pick up his personal belongings.

There is no dispute about the fact that there had been a conversation that day between
 25 those two individuals. Each gave testimony about it. The accounts of each suffer from certain infirmities, however. For example, omitted from Hockert's description during direct examination was any mention of the Union. Only during cross-examination did she acknowledge that Feldman "talked about the [U]nion," but asked what she had said about that portion of their conversation, Hockert claimed, "I don't -- I don't -- I'm sorry. I do not remember what I said. ****
 30 In my office." Indeed, she never disputed Feldman's account that he had expressed dissatisfaction with having been transferred to Fraser Center and said he "really felt like quitting" because of that transfer. Nor did she refute with particularity that she had retorted, "Don't quit. That's what they want you to do. Don't quit."

No reason other than the Union is suggested by the record for Respondent to "want"
 35 Feldman to quit. So far as the evidence reveals, he had been a satisfactory employee. Accordingly, there is some objective basis for concluding that Hockert had said that Respondent wanted Feldman to quit because of his activism on behalf of, and support for, the Union. Even so, his testimony about how he and Hockert came to be in her office, where she
 40 purportedly had made those remarks, on May 19 is suspect.

Feldman testified that she had "pulled me into her office" and had closed the door, saying as she did so, "Don't you know that that is Alyce's snitch," referring to Barbara Johnson who then was working at the Glendale Center's front desk. In contrast to her nondenial of
 45 having said to Feldman that "they" wanted him to quit, Hockert did challenge that remark about Johnson. She testified that it had been Feldman who had made that accusation: "Brett said -- asked me if he could come into his [sic] office because he didn't want to talk in front of Barb Johnson because she was one of Alice's [sic] snitches." Two aspects of Feldman's own testimony tend to show that Hockert's testimony about the Johnson remark is the more probable account.

First, Feldman straightforwardly opined while testifying that he had believed members of

the Parent Involvement Committee – a committee of parents formed, apparently at the beginning of 1997, to increase parent involvement in Respondent’s operations – to be “union busters”, and that he “used to tease each -- probably each of them -- at least three of them. I would call them the union buster and,” at which point counsel cut off his embellishment of his answer to a question seeking no more than a description of that committee, not his opinion of its purpose. Johnson was one member of the Parent Involvement Committee.

In fact, that answer is illustrative of a number of points at which Feldman launched into accounts which were not called for by questions, but which he appeared to feel needed to be said. As will be seen below, that tendency would cause him difficulties with regard to another aspect of his account of the May 19 conversation with Hockert. This first point, concerning Feldman’s opinion of the Parent Involvement Committee members, however, does make it more likely that he, not Hockert, had referred to Johnson as a “snitch.”

Second, Feldman’s repeated demonstration of a tendency to add to his answers gave rise to related troubles for him, in connection with the “Alyce’s snitch” statement. During direct examination he made no mention of Hockert assertedly having said that on May 19. Nor did he include it among any accounts about that day’s conversation which he gave during cross-examination. Only belatedly, during redirect examination, did he abruptly inject that account into his testimony, as being a remark purportedly also made by Hockert on May 19. When its previous omission from his accounts was pointed out during recross examination, Feldman answered “it just never was questioned in the way it was questioned” during redirect examination. In fairness to Feldman, there arguably is some merit to that explanation.

Even so, that does not suffice to explain why the purported “snitch” remark had also been omitted from his prehearing affidavit’s account of his May 19 conversation with Hockert. There is no basis for concluding that, when giving the affidavit, he had not been asked to relate everything which had been said during that conversation. But, the “snitch” remark was not in the affidavit.

Feldman made an effort to explain that omission, along with another Hockert-comment which he claimed had been made, but which also was not included in his affidavit’s account. He testified that after the affidavit had been prepared by the Board Agent, he had taken it home, had rewritten it and, then, had signed and returned it to the Board Agent. “It was my understanding that I could do the affidavit how I wanted to do it,” he testified, and, “I’m a writer and I felt more comfortable writing it.” In the process, Feldman testified, he had deleted purported remarks by Hockert, on May 19, which he felt were not “appropriate for an affidavit,” because he regarded them as not “necessary” and as “disrespectful,” without having “anything to do with” what was alleged in the unfair labor practice charge.

As I pointed out during the hearing, in my experience it is not unusual for witnesses to take away affidavits and review them, making revisions, before finally signing them. In fact, that process is fairly common when affidavits are taken from officials of respondents, employers and unions. Ordinarily, however, the point of doing that is to ensure accuracy and completeness in what appears in those affidavits – not to edit out that which a witness feels is inappropriate, unnecessary or “disrespectful.” Deletions such as those made by Feldman more naturally indicate a witness’s inability to swear under oath to the truth of the deleted portions. Of course, when that witness then does not include those deleted portions in his/her testimony until after cross-examination, belated and abrupt injection of such remarks appears more naturally to be the result of an effort to add to the direct examination’s account for the purpose of strengthening and fortifying that account, rather than to be the result of truthfully reciting what had actually been said and done.

That was not the only objective problem about Feldman's testimony. He claimed that while at Fraser Center on and after April 29 he had less work to do than before, while he had been working at Glendale Center. In fact, he claimed that "it was probably dead" during the time that Smith had been on vacation. Yet, his daily activity logs for April 20 through May 12 hardly show that he had little to do during that period.

Those logs reflect for each of those days a full list of duties perform by Feldman from 8:30 a.m. to 5:00 p.m. There can be no question about their accuracy. Each had been prepared by Feldman who agreed that it had been important for him to prepare accurately his daily activities logs. Based upon his logs, there is hardly a basis for concluding that he had been left without work during his first two weeks at Fraser Center.

To be sure, he also testified that he had sent to Fraser Center "a couple of applications that I work with at Glendale" to enable him to continue "perform[ing] my Glendale work as well." But, asked what work he had continued doing for Glendale Center, Feldman described only having continued preparing purchase orders. Now, there has been no showing that purchase order preparation consumes any significant amount of a record clerk's time. In fact, the logs for April 29 through May 12 state that Feldman did work for Glendale Center only on April 29 (his first day at Fraser Center) for two hours, on May 1 for one hour, on May 2 for two hours, on May 6 for two hours, on May 7 for one-half hour, on May 8 for part of a total of one-and-a-half hours, on May 9 for two-and-a-half hours, and on May 12 for two-and-a-half hours – a total of 14hours, at most.

Fourteen hours during an overall ten-day period is not an insignificant amount of time. Nonetheless, Feldman worked a total of eighty hours during the ten work days from April 29 though May 12, after which, he testified, Smith had returned from vacation. Over that period, Glendale Center work had occupied only approximately 19% of his total work time. The other approximately 81% had been occupied entirely with Fraser Center work, according to the logs which Feldman had prepared. That hardly supports an characterization of things having been "probably dead" during that period. Beyond that, the limited work for Glendale Center during that period provides some explanation for Feldman having been relieved from having to spell Fraser Center's receptionist when the latter took breaks and went to lunch.

Feldman's daily activity logs for April 17 through April 28, when he was working at Glendale Center, reveal that, during those eight work days, he had mostly "ANSWER[ed] PHONES". The only other work shown by those logs is what appears to be two hours on April 18 spent assisting a parent between 2 and 4 p.m.; two hours working on a sing program and another hour-and-a-half entering data on April 21; two hours working on a sing program on April 22; an hour-and-a-half entering heights and weights on April 23; an hour-and-a-half generating lists of missing information on April 24; two hours entering data on April 25; and, an hour-and-a-half creating purchase orders on April 28. In sum, during a total of 64 work hours over the course of those eight work days at Glendale Center, Feldman had spent a total of but 14 hours doing tasks other than answering phones.

The 14 hours of other work are entered on the logs in a fashion which appears to show that those tasks were ones which Feldman had performed subordinately to the principal task of answering phones. That is, the other tasks are entered on that logs as, in effect, sub-entries to the principally-listed task of "ANSWER PHONES". As an objective matter, answering telephones would not seem to require any significant expertise and skill. Certainly there is no evidence that any particular experience or skill is necessary to do so at Respondent. By contrast, Feldman testified that he believed himself to be one of the most skilled people at

Respondent on computers. Like Feldman, Mary Smith is, and had been prior to April 29, classified as a records clerk, only one who worked at a larger center than Glendale. Thus, as an objective matter, reassigning Feldman from telephone answering to replace Smith, while she vacationed, seems a logical personnel choice.

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Furthermore, while appearing as a witness for the General Counsel, Smith gave testimony which tends to further undermine the unlawful motivation allegation made in connection with Feldman's transfer to Fraser Center. First, she testified that she had gone on vacation during May and, moreover, that she had requested that vacation. Thus, it cannot be

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plausibly argued that Respondent initiated the idea of giving Smith a vacation as some sort of vehicle for transferring Feldman to Fraser Center.

True, Smith testified that she had made that vacation request because "we were slow[.]" But, she did not testify that things were so slow as to be "dead," as Feldman claimed. In fact,

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Smith's daily activity logs from April 3 through April 16 show that her workdays had been pretty fully occupied with various types of work, just as Feldman's workdays afterward seem to have been occupied fully. Thus, her characterization "slow" appears to have been more a relative, than an absolute, one.

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Second, Smith testified that when she had gone on vacation during past years, someone always had been assigned to perform her Fraser Center records clerk duties: "Someone would do it." Of course, that might not mean a records clerk from another center. But 1997 presented a different situation.

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Third, Smith testified that she had been told, by Dillon and Rangel, "[b]efore I went on vacation," that upon her return from vacation she (Smith) "was gonna [sic] be working with Chris [Peterson] on the computer" to create a new database. In fact, the evidence, including Feldman's own testimony, shows that Respondent did undertake creation of a new database during the late Spring. In connection with creation of that database, Smith worked during the

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ensuing summer months testing it and preparing a manual in connection with it. There is no allegation that any of those activities had been discriminatorily motivated, nor somehow otherwise in violation of the Act. Thus, it cannot be said that Respondent somehow abruptly decided when Smith returned from vacation to assign a previously unplanned task to her, so that Feldman could be retained at Fraser Center during the Summer.

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Fourth, as to selection of Feldman to replace Smith, she testified that, after herself, he was next in line for assignment to replace her, based upon his experience and expertise. Indeed, Feldman acknowledged that he believed that he was one of Respondent's most skilled people on computers. Consequently, not only was there nothing extraordinary about replacing Smith while she vacationed during the Spring, but there appears nothing objectively

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extraordinary about having selected Feldman as her replacement. Particularly is that so, given the fact that once Smith returned from vacation, she would be working on a special project and someone would have to perform Fraser records clerk summer duties which she ordinarily would have performed. Choosing Feldman to do so allowed that replacement to be made by an

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experienced and skilled records clerk.

Smith did not start working on the database immediately upon her return from vacation. "I didn't start the day I came from my vacation. It was about a week or so later I started. I was in meetings with Chris," she testified, "to know what I did -- what I was to do and everything [sic]." During the interim she performed her normal duties. Feldman appeared to be trying to establish, through his testimony, that he had nothing to do during that immediate period following Smith's return from vacation. Yet, his own daily activity logs for May 13 through May

28 record that he had seemingly been fully occupied with work at Fraser Center during each of those days.

In fact, those logs reveal that, from May 13 through 28, his only connection with Glendale Center and its work had occurred on May 19, when he went there for his personal belongings and, while there, had attended a TB information staff meeting and "ASSISTED LYNDIA ON USE OF PO DATA BASE"; on May 23 when he spent three hours repairing records both for Fraser and Glendale Centers; and, on May 27 when he went to Glendale Center for a free TB test. Given those entries made by Feldman, it can hardly be said that actual work for Glendale Center had consumed a very significant portion of his work time after Smith returned from vacation. And as those entries show that he had been fully occupied during each of the workdays from May 13 through May 28, there is no basis for concluding that Feldman had been left without work, regardless of his work station at Fraser Center, following Smith's return from vacation.

In large measure Feldman's descriptions about his situation at Fraser Center seemed to be the more the product of wanting to be viewed as a victim, than being the result of some type of discriminatory action or, even, of any actual hardship. Thus, he griped about being susceptible to more close scrutiny at Fraser Center, because Respondent's administrative personnel are officed there, than would have been the fact had he continued working at Glendale Center. But, there is no evidence, and he gave no particularized testimony, that he actually had been the object of close watchfulness by Fraser Center personnel. Of course, that was the center at which Smith worked and she was the individual whom Feldman was relieving, during her vacation and until she finished work in connection with the new database.

It also should not be overlooked that Glendale Center, along with other centers, had been closed during the Summer of 1997. So, had Feldman not been transferred to Fraser Center, so far as the evidence shows he would have been laid off or reassigned elsewhere during that Summer. It also should not escape notice that summer-closure of Glendale Center supplies a valid reason for allowing him to clear out his personal effects that were located there.

Feldman complained about having to sit in a chair at a desk other than the records clerk's work station in the Fraser office, following Smith's return from vacation. In fact, it does appear that, upon her return, Smith resumed sitting at her usual desk. But, she was to do computer-related work on the special project and, at the time of her return from vacation, that was the only desk where a computer was situated at Fraser Center. Later, another one would be acquired. Still, as of May 13 it hardly seems remarkable that Smith would resume sitting at a desk where the only Fraser Center computer was located.

Beyond that, there is some basis for inferring that Smith had not been particularly pleased at having to relinquish her normal duties to another person, such as Feldman. Apparently unaware as of May 12 that Smith already had been informed that she would be involved in creating a new database, Feldman testified that, during his evening telephone conversation with Hockert, he had opined "that Mary is going to freak out [upon learning of the special project] because she's been in this job [Fraser Center records clerk] for a long time." Then, when testifying about Smith having taken back her usual chair and desk, following her return from vacation, Feldman testified that, "I wasn't going to remove her from her seat," even after he had been told that he was to be doing work that necessitated his sitting where Smith had re-situated herself upon her return. "I wasn't forceful to remove her from her seat," he testified.

So far as the record shows, Respondent's officials initially had not realized that Smith

was continuing to sit where she ordinarily did. But, on May 19 Dillon observed Smith's and Feldman's seating arrangements. On that date, testified Feldman, Smith said, "You got to be in this seat. Didn't Alyce talk to you?" When Feldman replied in the negative, he testified that Smith said, "She wants you in this seat. I'm supposed to keep you in this seat. This is your
 5 seat and I'm not supposed to let you be roaming around." Of course, if, as he testified, Feldman had already understood by May 19 that the seat to which Smith was directing him was the one in which he should be sitting, then such a supposed direction by Dillon to let him sit there hardly can be construed as somehow nefariously motivated.

10 The "roaming around" remark appears intended to show that Respondent was attempting to confine Feldman's movements around Fraser Center. However, there is no evidence that, until May 19, Feldman had been doing so. Certainly, there is no evidence that he had been "roaming around" on behalf of the Union. Smith never corroborated Feldman's testimony that she had said to him, "I'm not supposed to let you be roaming around." But, she
 15 did deny specifically that Dillon had ever said anything to her about who should sit in the chair in front of the window.

Feldman also testified that, after two or three days working at Fraser Center, he had been told that he no longer was to cover for the receptionist when the latter took breaks and went to lunch. As pointed out above, that may have resulted from the fact that he was
 20 continuing to try to help out with some Glendale Center work. But, he claimed that a Fraser Center supervisor, with whom he was friends, had told him that the change "came from the top." Still, that is not necessarily unusual, given the fact that, at Fraser Center, Feldman was being supervised directly by Director of Operations Rangel.⁹

25 There is no evidence that spelling the Fraser Center receptionist somehow aided Feldman in performing union or statutorily protected activities. More importantly, there is neither direct evidence, nor basis for inference, that Respondent would have been aware that Feldman regarded answering telephones as being so significant a duty that relieving him of it
 30 might lead him to quit. In fact, he never specifically testified as much. Given his skills, it hardly is objectively illogical to have chosen to relieve him of that responsibility so that he could devote more time to more skilled pursuits as a records clerk.

From the very beginning, admitted Feldman, he had been suspicious about Respondent's motivation for his transfer to Fraser Center: "before I left Glendale I told people
 35 that I didn't think I was coming back." His suspicions heightened throughout his service there, before he was transferred back to Glendale Center. However, in determining the lawfulness of an employer's motivation, "It has long been held that no weight should be placed on the subjective reactions of employees" (Citations omitted.) *Gem Urethane Corp.*, 284 NLRB 1349, 1351, fn. 11 (1987). See also, *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1408, fn. 7 (10th
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⁹ Contrary to one argument made, there is no evidence that Fraser Center Director Lasley became Feldman's immediate supervisor, following his transfer there. The record citation used to support that argument, "Tr. 635-636", shows only that when Feldman had been unable to locate Rangel on May 14 to report his grandmother's death, Lasley had told him he could leave
 45 work: "Yeah, it's okay. Worry about your family business." Such permission, arising from an extraordinary situation, hardly conveys a change in immediate supervision. True, Lasley did sign Feldman's daily activity logs while he was working at Fraser Center. Yet, there is no showing that such supervisory signatures are other than *pro forma*, to allow payroll to prepare checks paying employees for their time spent working. In the final analysis, there is no reliable evidence that, while at Fraser Center, Rangel ever had ceased being regarded as Feldman's immediate supervisor.

Cir. 1997).

H. *Remaining Allegedly Unlawful Statements*

5 Left for discussion are two conversations during which it is alleged that Hengemuhle, in one, and Davis, in the other, made statements which violated Section 8(a)(1) of the Act. As to the first, literature distribution on behalf of the Union continued following Radder's termination. One document distributed was "P.I.C.A. UNION NEWS", dated April 7, 1997. To the extent pertinent, it recites on the second page that one "union organizer at work" is Merrilene Jensen.
10 Hengemuhle testified that she had not been aware of Jensen's involvement with the Union until she had seen that particular document.

 Another Union publication, dated – albeit incorrectly – April 31, 1997, is one of its "Action" newsletters. The first and seventh page are almost wholly absorbed by an article
15 concerning Radder's discharge. Among other malevolent actions which the article attributes to Respondent in connection with that termination are such statements as, "Imagine that you are asked to sub in a room across from the principal, so that you can be constantly monitored." The article also lists a series of assertedly "adverse conditions" prevailing at Respondent, one of which is "discriminate treatment of employees". Several copies of that "Action" newsletter
20 were left in the front foyer of McKnight Center by someone other than Jensen.

 There those copies were discovered by Hengemuhle when she arrived for work. She picked up a copy and began reading the article concerning Radder's discharge. She testified that she regarded the article to be "hurtful because I took it as a personal attack on me." In that
25 respect, Hengemuhle singled out specifically "the part where it says that, imagine if you were asked to sub in a room across from the principal [sic] office so you could be constantly monitored," although she added, "I read the whole content." The only other portion of the article to which Hengemuhle was specifically referred was that involving the list of "adverse conditions". She agreed that that portion "saddened" her, because of her "pride in being fair and equitable," and also described how her 25 years of association with Respondent had
30 enabled her to turn around her personal life and empowered her to advance professionally.

 As Hengemuhle was reading the article in the foyer, Jensen arrived for work. At that point Jensen had not yet seen the article. A lengthy conversation ensued between the two
35 women. During that conversation, it is alleged, Hengemuhle made four allegedly unlawful statements: that she was upset about the article and took its accusations personally; that she did not want the Union's flyers in the building and that employees could only discuss the Union before and after work, and during breaks; that union activity was not in Jensen's self-interest and that she should not be concerned with speaking for everyone; and, that Respondent was
40 engaging in surveillance of union meetings.

 Hengemuhle denied that she had said that Jensen could be disciplined or lose opportunities for promotion if she continued to engage in union activity, and denied possessing any knowledge of management engaging in surveillance of employees' union activities.
45 Nevertheless, there were other aspects of Jensen's description of their conversation that day which Hengemuhle did not deny. Beyond that, Hengemuhle admitted having said that she was upset about the article, took it personally and did not want the newsletter in the foyer.

 Jensen and Hengemuhle agreed that there had been two phases to their conversation. The first occurred in the front office foyer, then moved to the hallway. The second phase occurred either in Hengemuhle's office or in the small conference room adjoining it.

As to the first, Jensen testified that after she had signed in, Hengemuhle said, "Merle, I didn't know until I read the newsletter with your name on it [the above-mentioned P.I.C.A. UNION NEWS of April 7] that you were part of the union organizing," adding, "you're the only one I know so I'm going to give these to you." Hengemuhle gave Jensen the copies of the newsletter and, according to Jensen, said, "that the article was very misleading and she took it very personally and she did not want them in her building." Jensen testified that she explained that she had not read the newsletter, but felt that the Union "is a really good idea, that we could work together," to which Hengemuhle replied, "I understand you can talk about the [U]nion before work, after work, on your break time. I do not want them here. I believe I can have them taken out." It is that portion of Jensen's account upon which the first two of the above-enumerated four allegations are based.

In fact, Hengemuhle pretty much admitted that she had made the remarks on which the first of those two allegations – that she was upset about the article and took its accusations personally – is based. Moreover, Hengemuhle never denied having said to Jensen, "I can understand you can talk about the [U]nion before work, after work, on your break time."

As to her admission, Hengemuhle testified that as she had handed the newsletters to Jensen, she had said, "I'm giving you these newsletters and the only reason that I'm doing that is I'm aware that you're involved in the union organization. I had seen your name on a flyer, a PICA union flyer, otherwise I wouldn't be approaching you this way and I don't want these newsletters in my front office area." When Jensen said that she did not know what Hengemuhle was talking about, Hengemuhle testified, "I said, this newsletter is full of lies and I'm taking it personal. It questions my integrity and I have 25 years of experience working with [Respondent] and building my career," and "it hurt my feelings and I was feeling very emotional about it and I didn't want them in my front office."

At no point did Hengemuhle testify that she had recited to Jensen the portions of the article which she (Hengemuhle) regarded to be "lies" that hurt her feelings and caused her to become "very emotional." Jensen was questioned during cross-examination about whether Hengemuhle had enumerated the article's assertedly offending statements. In response to that examination, Jensen testified – as it turned out, consistently with the testimony which Hengemuhle would later provide – "I don't know what she was specifically upset about, but she said, the article, so she didn't point out any particular areas to me," although, as discussed below, Hengemuhle would later discuss certain issues covered by the article.

The one significant dispute between Jensen and Hengemuhle about the first phase of their conversation involved the location in which Hengemuhle said that she did not want the newsletters. As set forth above, Jensen testified that Hengemuhle had said "in her building"; Hengemuhle testified that she had said "in my front office." Of course, the difference is one of degree, for analytical purposes, and Jensen acknowledged that, during the afternoon of that day, copies of the same newsletter had been placed in the staff lounge by someone, but Hengemuhle had said nothing about their being there. Nevertheless, interrogated further during cross-examination as to what Hengemuhle had said, Jensen answered firmly, "Yes", when asked if she had testified previously that "Ms. Hengemuhle said she did not want union flyers, in the building" At no point thereafter did Jensen back away from her testimony that Hengemuhle had said "in my building."

As to Hengemuhle's undisputed remark about understanding that Jensen could "talk about the [U]nion before work, after work, on your break time," however, Jensen conceded that she did not "believe" that Hengemuhle had ever communicated to her (Jensen) any policy of Respondent regarding whether employees could talk about union issues on work time and,

further, that it was “true” that Hengemuhle never had told her (Jensen) that she was prohibited from passing out flyers nor from engaging in union activities during work time. Still, further cross-examination generated answers showing that, even by the time of testifying, Jensen remained confused as to what Hengemuhle’s remark had meant:

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Q You were free to engage in union activities on work time isn’t that right without any fear of discipline?

A I was free to exercise union.

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Q To engage in union activities during work time?

A I don’t think that was ever -- it was ever clear, yes or no, I’m assuming no.

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Q But you don’t have any specific information that you were specifically prohibited from engaging in union activities during work time?

A Gretchen had said before work, after work and on your lunch break.

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Q And that as you understood it was her understanding of when would be the appropriate times to engage in union activities, isn’t that right?

A That’s correct.

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Q Was that Gretchen’s preference basically?

A I would assume so.

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Obviously, a supervisor’s “understanding” or “preference” can be naturally construed by an employee to be the course that the employee is being told to follow.

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As to the second phase of the conversation, there is no dispute that, at Jensen’s behest, she and Hengemuhle moved from the hall to the latter’s office or to the adjoining small conference room. Yet, at least initially, there appears to be a discrepancy as to what led them to do so. During direct examination, Jensen testified “there was a point where I just thought it was inappropriate in the hallway to continue speaking about” the Union, and “at that point I said I would like to -- you know, could we talk about this in the office and we both agreed on it so we both went back to the office.” Hengemuhle, however, advanced a different description of Jensen’s words which led them to move from the hallway.

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According to her, after saying that she had not read the newsletter, Jensen had asked “can I talk to you off the record?” Initially, testified Hengemuhle, “I said, I don’t think so. You know, I don’t think that I should be doing that.” However, when Jensen persisted in requesting “talk off the record,” saying, “I have a lot that I’d like to tell you,” Hengemuhle testified, “I said
 5 okay, and we went back into the small conference room ... by my office and sat down at the table.”

During cross-examination Jensen’s testimony tended to confirm the foregoing testimony by Hengemuhle. For example, Jensen answered, “Yes, I was,” when asked if it was not true
 10 that she had been interested in Hengemuhle’s personal opinion about unions. Further, asked if she had specifically solicited information about unions from Hengemuhle, Jensen responded, “That’s correct.” Jensen gave that identical response to the follow-up question about both women having communicated to each other that they were only going to give “personal opinions and not speak on behalf of others,” after having earlier testified that Hengemuhle had been
 15 giving her personal opinion about whether a union would be “appropriate at” Respondent.

The directly significant aspect of those answers to one of the above-enumerated specific allegations of unfair labor practices arose when the following answers were given by Jensen to the following questions:

20 Q And specifically Gretchen said to you, now you speak for yourself, did she say that to you during that conversation?

A Yes.

25 Q And she said, “I am going to speak for myself,” right?

A That’s correct.

30 Of course, that sequence relates to the allegation that Hengemuhle unlawfully had said that union activity was not in Jensen’s self-interest and that Jensen should not be concerned with speaking for everyone.

According to Jensen, among the subjects discussed after having moved from the
 35 hallway had been that of “speaking only for myself, that I shouldn’t speak for other people, only for myself.” However, aside from her above-quoted answers during cross-examination, that is about the only testimony by Jensen pertaining to that allegation. She continued by describing Hengemuhle’s question about how really informed was Jensen about the Union, followed by Hengemuhle’s expression of her opinion concerning the Union’s actual objectives for trying to
 40 organize Respondent’s employees. Nevertheless, it is clear from Hengemuhle’s testimony that comments about Jensen speaking for herself had been made, independently of the discussion about the two women speaking only for themselves in an exchange of personal views.

Hengemuhle testified that, after having left the hallway, Jensen had opined that, “Things
 45 are getting dirty” and that she was experiencing “mixed loyalties,” as a result of that opinion and her “commitment to be involved” in the Union’s campaign, leaving her uncertain “what I should do.” To that, Hengemuhle testified that she had replied that if Jensen felt “strongly about something you should plant your feet firmly on the ground and speak what you feel proud -- what you believe in,” adding,

if this was about your child, you’d plant your feet firmly and stand by your convictions.
 And I said, but I think you need to be careful, I said. I used to be the person that would

get up in front of the group and be the one that talked and then I turned around and there was no one standing behind me to support me on the issues, so be careful who you're speaking for. Speak for yourself, and she just said, you know if people would of [sic] talked to us before, it might of [sic] not gotten this far.

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With respect to the alleged statement that Respondent was engaging in surveillance, Jensen testified that, as they continued discussing the Union, Hengemuhle had said that Dillon did not care if the Union came in. To that, testified Jensen, "I said that it was going to be difficult to have -- trying to get the [U]nion in because -- I said 'For God's sake, we're having people watching us when we have a meeting.' So the response was 'So what?'" According to Jensen, when Hengemuhle voiced that response, she hit the desk once with her fist.

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During cross-examination, an effort was made to lead Jensen into an admission that Hengemuhle had not really admitted that Respondent was engaging in surveillance of its employees' union activities. In fact, Jensen acknowledged that Hengemuhle had not actually said that she or any other representative of management was spying on Jensen or any other employee. Yet, as Jensen pointed out, "I wasn't sure what she meant by her response," and, "[m]y interpretation was that she was aware of an activity, it was just a short response" -- that is, "so what."

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The response may have been short. But, Hengemuhle never denied have uttered it. As pointed out above, she did deny possessing any knowledge that any management representative had been spying on the Union. However, asked if Jensen had "indicate[d] anything with respect to being monitored or being surveyed [sic]?" Hengemuhle responded, "No, she didn't say anything to me about that, no," adding, "Basically we talked about how she was feeling. She was confused, and, you know, didn't like how the activity was evolving." Still, when then asked what else had been said, Hengemuhle reversed the direction of her above-quoted negative answer, by giving the internally contradictory answer, "Umm -- she asked me if -- she asked me if staff were doing surveillance on union meetings? And I told her that I didn't know. I had no knowledge of that."

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In addition to the foregoing subjects, Jensen and Hengemuhle also discussed three other subjects, though there is no contention that those discussions gave rise to an independent violation of the Act. The first area involved Radder's discharge. When they had left the hallway, testified Jensen, Hengemuhle asserted that Radder had not been assigned to the high five classroom on March 7 so that she could monitor him and she had not "jump[ed] out of my office to catch Jan," which, of course, is essentially what was charged by the "Action" article to which Hengemuhle took umbrage. According to Jensen, Hengemuhle emphasized those denials by banging her fist on the desk or table.

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Hengemuhle continued, Jensen testified, by saying that "she had been leaving her office and saw Jan alone with children," and became "very angry at the way that Jan looked at her," when she had approached him about being alone with those children. As to that, according to Jensen, Hengemuhle "said that he looked at her like 'what right do you have to question me about these children' and then she commented that *people in the cubicle had not -- were not paying attention to Jan being with these children.*" (Emphasis supplied.)

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Jensen further testified that Hengemuhle then said, "She needed to report this to human resources so she said when she called human resources it wasn't until then that she was informed that there were other things in his file which would -- where there would have to be -- *he'd have to be fired* for this," leaving her with no "*choice but to fire him*, [even though] she liked him as a teacher." (Emphasis supplied.) Hengemuhle did not contest any aspect of this

account by Jensen concerning those remarks about Radder's termination.

The other two subjects discussed in the office or adjoining conference room were the competency-based program and, in addition, the wage increases. It is undisputed that Hengemuhle told Jensen that "for day care with Head Start being the number one grantee and with welfare reform there is going to be a lot of changes and Head Start is going to be doing basically -- we're going to be meeting the needs of the parents to zero to three as well"; that, "People in the agency in administration were not getting younger," and that "[t]hey needed to know that as they got older that their staff was qualified to take on their positions and that was one of the reasons for this competency based program"; that the competency-based program "had been in the making for a long time"; and, "That everything takes a long time because it all has to be voted on where we were at and talked about, you know, the wage increase was planned -- it had to go through a grant process," but that the wage increase had been planned for a long time before December of 1996.

Jensen was uncertain whether or not it had been during this particular May conversation when she had complained to Hengemuhle, "I'm off probation and now I'm back on it again," being "considered a trainee" which "offended" her (Jensen) "because I feel I really know my job and people come to me on how to do things so to be considered a trainee and to have someone else who doesn't show as much competency receiving top scale journeyman level pay it's very frustrating for me." According to Jensen, Hengemuhle "mentioned it was *a different kind of probation* but I'm not clear. It was never clarified. I'm not sure what was meant by that." (Emphasis supplied.) Still, testified Jensen, Hengemuhle had "said [it was] *not that kind of probation.*" (Emphasis supplied.)

Their lengthy conversation concluded as the time approached for children to arrive. Jensen testified that, picking up the copies of the newsletter, she said, "I haven't read it but I don't believe in smear campaigning and if it is that bad I'll put it in the garbage," to which Hengemuhle "kind of put her hands up, she is like, you know, 'I'm not telling you to'," but, testified Jensen, "I said 'I know' but I kept one for myself." Hengemuhle testified that when she had seen Jensen dropping all but one of the newsletters in the wastebasket, she had said, "you don't have to do that," but Jensen said "she wanted to do that."

Turning to the second conversation, involving McKnight Center Supervisor Davis, it is alleged that an employee, assistant teacher Knox, had been unlawfully threatened as a natural consequence of questioning by Davis about whether her conversation with another employee, head teacher Jensen, had occurred on Respondent's time. In fact, Davis admitted having asked the question attributed to him, though he advanced a business-related reason for having done so. Moreover, he and Knox placed the conversation as having occurred at different points in time.

The hearing in the instant matter was scheduled originally to commence on June 13. Knox received a subpoena from the General Counsel, to appear as a witness on that date. She was most unhappy when she received that subpoena: "I was furious that I was brought into this because I feel I had nothing to do with this," and June 13 would be "the same day as our graduation, the same day as our family picnic, for" Respondent. In consequence, she testified that she first "went storming to my boss," Center Supervisor Davis, and asked, "What is this? What is this about and why am I in this".

Davis took the subpoena to Center Director Hengemuhle and, testified Knox, by the time that she had arrived in the office, Hengemuhle was speaking on the phone to Respondent's counsel. Knox was offered the opportunity to speak with that attorney and she accepted that offer, telling the attorney that she wanted relief from having to appear in compliance with the

subpoena. Hengemuhle took back the phone and started faxing the subpoena to counsel.

As the fax was being sent, Knox testified that she remarked to Davis, "I wonder if this is what Merrill Jensen ... was talking about," and Davis asked what she meant. In reply, Knox testified that she described a conversation in the large muscle room during which Jensen "was basically saying did I -- am I -- you know, I should think about joining the [U]nion."¹⁰ When she told that to Davis, testified Knox, he "asked me was this on company time, work time, whatever, and I said yes, it was. It was in -- when both of our classes were in the muscle room," and, she testified, Davis retorted, "That's all I wanted to know."

During cross-examination Knox testified that the only time that Davis had talked to her about the Union had been the occasion when he had asked to speak with her after having observed her speak with Radder, as described in subsection C above. However, any internal contradiction created by that answer, and by her description of the question put to her by Davis after she had received the subpoena, was erased when Davis testified. For, he acknowledged having participated in a conversation with Knox during which he had asked if she and Jensen had been on break when the latter spoke to the former about the Union. Thus, he conceded that he had participated in two conversations with Knox in connection with the Union. However, he testified that his conversation with Knox about Jensen had taken place "in late winter of 1997," and described a different sequence of events concerning it.

According to Davis, he had been standing in front of his office as Knox had exited the large muscle room, across the hallway. Davis testified that Knox walked to where he was standing and initiated a conversation by saying, "Merl Jensen was trying to attempt to get her to join the [U]nion, and she basically said do you -- that Merl was bothering her and that she wanted Merl to stop." Davis testified that Knox also reported that Jensen's overtures on the Union's behalf had occurred inside the large muscle room and that he "asked Michelle after she informed me that it was -- indeed was -- were -- her and Merl were on a break, where [sic] they on break at the time of the conversation?"

Davis did not describe Knox's answer to that question. Asked why he had put that question to Knox, he testified:

I was concerned about the welfare of the children in the large muscle room area. It's a free play area and the teachers must be concentrated on the children and interacting with the children, and they're not a team. Merl's not the head teacher of Michelle and Michelle's not her assistant, so I was curious were they on break during this time if they were in the large muscle room.

¹⁰ According to Knox, Jensen had also said, "If I joined the [U]nion there wouldn't be a lot of bull crap that's going around in" Respondent, but Knox then added, as she testified, "I don't know what she means as far as bull crap because I think [Respondent] is a beautiful place to work."

Davis denied that he had interrogated or threatened Knox about union activity and also denied generally having prohibited an employee from talking about the Union during work time.

That explanation advanced by Davis is not so logical in the circumstances presented here, however, as might be the fact were different evidence presented. Respondent has presented no evidence of any rule at McKnight Center, nor at any of its other centers, prohibiting its employees from discussing personal, nonwork subjects while working. In fact, unrefuted is the testimony of several witnesses that nonwork subjects were discussed, without restriction or prohibition, while they were working.

Only two qualifications were mentioned in connection with that seemingly unrestricted allowance of discussions during work about nonwork subjects. First, Knox testified that “as far as the gossip we couldn’t bring problems to work. We are there to provide for the childrens [sic] and the families. That’s who needs us. To be in a professional manner, basically leave the bull crap at home.” Second, testified Knox, “there was a lot of people hanging out in the halls, you know, and we had that bad hanging outside the door conversating [sic], hollering down the hall and stuff, and as Gretchen came along she cleaned all that up.”

Davis never testified that his question to Knox, about the circumstances of being talked to by Jensen about the Union, had been motivated by any concern pertaining to the conduct which Hengemuhle had “cleaned ... up.” To the contrary, in his own account of what Knox had said to him, Davis testified that she had reported Jensen’s overtures as having taken place in the large muscle room – not in a hallway. Moreover, rather than having questioned Knox specifically about whether Jensen’s reported remarks had distracted the two teachers from their “concentrat[ion] on the children and interacti[on] with the children,” Davis acknowledged having asked only “where [sic] they on break at the time of the conversation?”

II. Discussion

In light of the preceding section’s description of the evidence, several allegations can readily be disposed of at the outset. As discussed in Section I.D., *supra*, the evidence does not support a conclusion that there had been anything unlawfully motivated by selection of January 1, 1994 as the date for competency-classifying all employees hired after that date as “trainee”. Marchessault credibly testified to having chosen that date as “the best date” even before the Union had come on the scene, in light of the longevity of Respondent’s entire staff. She testified about having announced that date during a meeting of all staff during August 1994 – over two years before the Union’s campaign had commenced. Not only was that testimony uncontradicted, but it tends to be confirmed by Radder’s testimony that during March of 1995 – more than a year-and-a-half before the Union began its campaign at Respondent – teacher Taylor had told him that she was being assigned to the “trainee” training session because “she had been hired after January 1, 1994[.]” The totality of the foregoing evidence supports Respondent’s defense that selection of the January 1, 1994 cutoff date had not been selected because of the Union.

Also unsupported is the allegation that all employees competency-classified as “trainee” – those hired after January 1, 1994 – would also be relegated to the personnel-classification of probationary employee. To be sure, as described in Section I.D., *supra*, Radder testified that on January 6 Murphy had “said that if you are a trainee you are also a probationary employee.” However, that testimony, as to what Murphy assertedly had said, was not corroborated by any other witness. Radder conceded that he had become confused by what Murphy had been saying and was testifying about her remarks based upon his interpretation and impression of them – in other words, based upon subjective understanding, rather than on the basis of exact

recollection about what she had said on January 6. In the end, he conceded that his confusion – which appeared genuine, it should be understood, just as counsel seemed confused when chided mildly by Dillon as she was testifying – stemmed from “the trainee equating probationary employee” aspect of her remarks.

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So far as that testimony shows, Radder was referring to the overhead transparency on which appears the equation, “**Trainee = Probationary Employee**”. Yet, as pointed out in Section I.D., *supra*, that transparency, viewed in its entirety, pertains only to staff “**first employed at**” Respondent. It is undisputed that all newly hired staff are personnel-classified as probationary during their initial year of employment, after which they become permanently personnel-classified as “regular” if their employment with Respondent is continued. So, the transparency conveys no message which differs from Respondent’s longstanding practice – one which presumably had been known to all employees attending the December 12 and January 6 meetings.

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Aside from Radder’s admitted confused testimony regarding that subject, there is no evidence whatsoever that Dillon, on December 12, and Murphy, on January 6, had equated “**Probationary Employee**” to the date January 1, 1994. That is, there is no evidence that either official had connected status as a probationary employee to the date “**1/1/94**” which appears on other transparencies. So far as the evidence discloses, that term had been utilized during those meetings only in connection with newly hired staff.

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Beyond what had been said at those two meetings, there is no evidence that on any other occasion an employee had been told that all trainees, even employees who had completed their first year of employment with Respondent, were to be personnel-classified as probationary. To the contrary, Jensen testified that, during her conversation with Hengemuhle discussed in Section I.H., *supra*, the latter had said “it was a different kind of probation,” though Jensen conceded that she still had been “not clear” as to what that meant.

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As pointed out in Section I.D., *supra*, an employee competency-classified as “trainee” is, as a practical matter, probationary. Not in the sense of personnel classification, but in the sense that failure to achieve satisfactory “trainee” competency-assessment leads to termination under the competency-based program, absent ability to transfer that “trainee” to some past-held job classification. Thus, it is easy to see how confusion might arise from that aspect of the competency-based program, leading both employees and supervisors to understand and utilize the term “probationary” both in personnel classification and in “trainee” competency-assessment contexts. However, there is no evidence showing that Respondent had intended use of that term – “probationary” – to be identical in both contexts. Effectively, that would have to be shown to have been what occurred for the General Counsel to prevail under the allegation which is made.

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In sum, the General Counsel does not contend that formulation of the competency-based assessment and pay program had been unlawfully motivated. Instead, one allegation is that, in presenting the program, Respondent had announced re-classification of all regular employees hired after January 1, 1994 – “trainees” – to the personnel classification of probationary. In fact, such a re-classification is not shown either to have occurred or to have been announced to employees. The lone connection between the competency-classification “trainee” and the personnel classification “probationary” shown by the evidence to have been announced, under the competency-based program, is the longstanding one for those “**first employed at**” Respondent. Inasmuch as that equation does no more than perpetuate a longstanding practice at Respondent, it cannot be concluded that, by the aspect of its

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competency-based program which continues to personnel-classify newly hired employees as probationary, there had been a change in Respondent's practice, nor that that aspect of the program had been motivated by emergence of the Union's campaign.

5 Moving to allegedly unlawful statements attributed to Hockert by Feldman – purported prohibition during December from discussing the Union at work, as described in Section I.C. *supra*, and an asserted May 19 threat that Respondent wanted Feldman to quit, as described in Section I.G., *supra* – analysis must begin by pointing out that Hockert effectively denied
10 neither of those allegedly unlawful statements attributed to her. That is, she never denied with particularity having said to Feldman during the last day before Winter break, “don’t get involved and not to talk about the [U]nion at work whatever” he did. Nor did she deny having said to Feldman on May 19, “Don’t quit. That’s what they want you to do. Don’t quit.” Of course, every party is responsible for carrying its own water in unfair labor practice hearings, as during every trial. Consequently, if a party fails to adduce a denial of testimony adverse to its position,
15 that is a relatively strong indication that it does not contest that testimony.

At one time it was held that a trier of fact had “no right to refuse to accept” uncontradicted testimony. *NLRB v. Ray Swift Transport Co.*, 193 F.2d 142, 146 (5th Cir. 1951). So rigid a view, however, has come to be characterized as “an ancient fallacy,” *NLRB v. Howell Chevrolet*, 204 F.2d 79, 86 (9th Cir. 1953), *affd.*, 346 U.S. 482 (1953), and the more modern
20 view is that uncontradicted testimony can be rejected so long as an explanation is provided for doing so. See, *MDI Commercial Services*, 325 NLRB No. 2, slip op. JD at 8 (November 8, 1997), and cases cited therein. See also, *Operative Plasterers and Cement Masons International Association Local 394 (Burnham Brothers, Inc.)*, 207 NLRB 147, fn. 2 (1973) and
25 *NLRB v. Local 138 International Union of Operating Engineers*, 293 F.2d 187, 192 (2d Cir. 1961).

As described in Sections I.C. and G., *supra*, there are objective problems presented by Hockert's testimony which renders suspect its reliability. With regard to Feldman's testimony,
30 however, a problem is presented which extends beyond internal contradiction and inconsistency with other evidence. That was his admission that he had rewritten his prehearing affidavit, to omit whatever he subjectively regarded as not “appropriate” or “necessary.” When testifying, he seemed to follow, at least during direct and cross-examinations, the script of that affidavit as he had rewritten it. In consequence, both the affidavit and, initially, the record were concededly
35 left with his accounts as he had edited them, rather than with accounts of what Hockert – and, for that matter, other officials – may have stated. Now, an admitted willingness to tailor an affidavit to delete that which a witness regards as not “appropriate” or “necessary” inherently poses a possibility that such a witness has chosen also to add and insert statements which the witness feels are “appropriate” or “necessary” for his/her case – to strengthen his/her overall
40 contention of having been unlawfully wronged.

In fact, there were many points when Feldman's assertions were contradicted by other evidence. As described in Section I.G. *supra*, his own daily activity logs contradicted his assertions that he had been left almost entirely with nothing to do at Fraser Center, following his
45 transfer there on April 29. Indeed, once there he seemed to be performing work more consonant with his computer skills, than had been the primary “ANSWER PHONES” duties which he had been performing at Glendale Center through April 28. He complained about the desk at which he had been obliged to sit once Smith returned from vacation. But, he acknowledged that he had known that it had been Smith – not Respondent – who had been responsible for her resuming her ordinary work location once she returned from vacation. Indeed, he seemed to view darkly even the eventual direction, which he attributed to Dillon, that Smith should relinquish that work station to him.

In connection with that change, Feldman claimed that Smith had said that she had been directed to keep Feldman from “roaming around”. Yet, there is no evidence whatsoever that he had been doing so at Fraser Center, though Hockert testified that he had been prone to do so at Glendale Center since early 1996 – even before he had begun supporting the Union. Beyond that, not only did Smith, a witness for the General Counsel, not corroborate Feldman’s account of what she supposedly had said to him, but she denied that Dillon had said anything to her about making a change in work location. Thus, the record is left with no evidence to support Feldman’s account about being prevented from “roaming around” Fraser Center – an account which he seems to have viewed as “appropriate” or “necessary” to support his overall position that Respondent was attempting to make him a target of unfair labor practices, like Radder and Ryan.

Eventually, Feldman accused Hockert of having said that Barbara Johnson was “Alyce’s snitch”. Hockert claimed that it had been Feldman who had made that accusation on May 19. In fact, Feldman volunteered that he had believed that members of the Parent Involvement Committee, such as Johnson, were “union busters” – a belief which objectively tends to support Hockert’s testimony that it had been Feldman, not her, who had accused Johnson of being “Alyce’s snitch” on May 19.

No objective facts lend much, if any, support to Feldman’s suspicions that his transfer to Fraser Center had been somehow made because of his support for the Union. To be sure, as concluded below, Respondent did discriminate on that basis against Radder and Ryan. Even so, there has been no specific showing of any discriminatory purpose to be achieved by transferring Feldman from Glendale Center to Fraser Center through the late Spring and Summer. True, he felt, and attributed to Hockert statement to the effect, that the transfer had been specifically motivated by Respondent’s desire to have him quit. Nothing supports such a feeling, however. That is, there is no particularized evidence, nor objective basis, for concluding that Respondent’s officials would have viewed such a transfer as so inherently distasteful to Feldman that it naturally would dispose him – or any employee – to quit. Indeed, there is not even a basis for concluding that Fraser is a less desirable center at which to work than Glendale, nor that Respondent’s officials would naturally have so perceived it.

In contrast, there is ample evidence to support Respondent’s defense for Feldman’s transfer to Fraser Center. Smith did choose to request a vacation. It was planned before April 28 to have her work on development of the new database. Feldman’s experience and expertise left him the logical records clerk to replace Smith, especially as his center would be closed for the Summer. Smith did work on the database, including on the subsequent manual preparation and testing incident to its implementation. Based on the daily activity logs produced during the hearing and prepared by him, Feldman had ample work to perform at Fraser Center, both during and after Smith’s vacation. Once Smith completed her special assignment, she resumed doing her ordinary Fraser Center duties and Feldman returned to the by-then reopened Glendale Center.

Given the foregoing considerations, I conclude that a preponderance of the credible evidence shows that Feldman’s transfer to Fraser Center had been made for logical and lawful reasons, unrelated to his support for the Union, and, therefore, fails to establish that the transfer would not have occurred had Feldman not been supporting the Union. Furthermore, in view of the unreliability of his testimony given in a seeming effort to support his personal view of an unlawful motive for that transfer, as well as his conceded tendency to tailor his accounts to provide what he personally believed to be “appropriate” and “necessary,” there is ample support for my impression that he was not a reliable witness, but was tailoring his accounts to support

his personal belief that he had been a victim, like Radder and Ryan, of unlawful comments and conduct. In consequence, his accounts – even ones which are not denied – are too unreliable to supply a basis for concluding that Hockert had made the allegedly unlawful statements attributed to her.

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A quite different situation is presented with respect to other statements and actions by Respondent and its agents. As described in Section I.C., *supra*, Knox testified that, during late December or early January, Davis had observed her talking to Radder and, then, had called her over. During their ensuing conversation, she testified, he had asked what she and Radder were discussing, if Radder was “talking that union stuff to you,” and, when she answered that Radder had been talking to her about the Union, if she had signed an authorization card. According to Knox, when she replied that she had not done so, Davis said that she should not sign a card because unionization of Respondent’s employees would mean loss of certain specified benefits: paid holidays, parents being able to become assistant teachers without possessing degrees or certificates, year-end personal and sick leave. Davis also warned, Knox testified, that a requirement would be imposed that employees punch a timeclock.

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Most of Knox’s account of that conversation was denied with particularity by Davis. Nonetheless, he acknowledged that he and Knox had participated in such a conversation, occurring after Knox had been speaking to Radder. Davis also acknowledged that she had told him that Radder had been discussing the Union with her, but Davis testified that Knox had volunteered that information and, then, had asked him about the consequences – to assistant teachers without degrees, on medical benefits, about having to punch a timeclock – if the Union became the bargaining agent of Respondent’s employees. In response to her questions, Davis testified that he had said that he did not know what would happen and, when she then inquired if he “thought that the [U]nion was a good thing for her,” had said that she would have to investigate and make her own determination.

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Davis also acknowledged having participated in a second conversation about the Union with Knox – on that occasion about the circumstances of Jensen’s overtures to Knox on behalf of the Union, as described in Section I.H., *supra*. Davis placed that conversation as having occurred during late Winter; Knox testified that it had occurred during June. Regardless of when that conversation had taken place, however, Davis did admit that he had asked Knox if her conversation with Jensen had occurred during their break. Knox essentially agreed that Davis had asked that question: “was this on company time, work time, whatever.” But, Davis never denied having retorted, when Knox answered that Jensen’s remarks had not been made during a break, “That’s all I wanted to know.”

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Nor did Davis explain what he had meant by such a remark. Presumably, had he been asked specifically, he would have testified that that uncontroverted remark had been based upon his concern, quoted in Section I.H., *supra*, about the welfare of children while teachers watching them were talking about a nonwork subject: the Union. In reality, however, such an explanation would simply make no sense. It is undisputed that employees discuss nonwork subjects as they are working. The only evidence of restriction on such conversations is that employees cannot be “hollering down the hall” and must not gossip about personal problems at home. Otherwise, there is no evidence of any restriction upon what employees may discuss while working, so long as those discussions do not distract them from watching the children under their care.

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As pointed out in Section I.H., *supra*, that is not what Davis asked about. He merely asked if Jensen and Knox had been on a break when the former initiated discussion of the Union with the latter. He knew that their discussion had not occurred in a hallway; Knox told

him that it had occurred in the large muscle room. Moreover, discussions about unionization can hardly be characterized as gossip about personal problems at home. To the contrary, the Supreme Court has held that the workplace is a location “uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees.” *NLRB v. Magnavox Company of Tennessee*, 415 U.S. 322, 325 (1974). True, employers can impose rules which legitimately restrict the exercise of dissemination of such views. But, there is no evidence that Respondent has done so – has restricted nonwork discussions to breaks nor, more generally, to nonwork times. Accordingly, Davis’s general question to Knox had no relationship to the purpose which he claimed had motivated it: at no point did he claim to have asked if Jensen’s union overtures had interfered with the two teachers’ ability to maintain watch over the children in their care.

Knox impressed me as a strong-minded individual who would not lightly complain to her supervisor about problems which she could resolve herself. In view of that impression, it seemed to me unlikely that she would initiate a complaint about conduct of a coworker – Jensen – which she could handle herself, by telling Jensen to cease discussing the Union with her (Knox). Still, Respondent makes two other essentially objective points which superficially tend to reflect on the credibility of Knox’s testimony.

First, it points out that Knox had been friends with Ryan whom Respondent had fired on February 20. Thus, the argument proceeds, Knox had a personal motivation for retaliating through testimony adverse to Respondent and, more particularly, to Davis, the official who had told Ryan that she was being terminated. Yet, Knox never displayed any bias against Respondent or Davis while she testified. To the contrary, at some points she gave testimony which, given my observation of her, she was perceptive enough to realize was not particularly helpful to Ryan. Further, her undisputed testimony, set out in Section I.H., *supra*, that she had gone “storming” to Davis about having received the General Counsel’s subpoena, and her uncontroverted request that counsel try to get relief for her from it, hardly support a conclusion that she was desirous of testifying against Respondent and Davis. Indeed, she appeared to be displaying complete candor when characterizing Respondent as “a beautiful place to work.”

Second, Davis and Knox both agreed that they were friends who had talked about many things at work. Still, friendly relations, of themselves, do not automatically absolve supervisors of the effect under the Act of threats made to, and interrogations of, employees with whom they are friendly, even when intimately so. “Interrogation is no less coercive merely because it comes from a friend,” *Isaacson-Carrico Manufacturing*, 200 NLRB 788, 788 (1972), but instead, “The existence of a friendship between a manager and an employee is only one factor to be considered in determining whether the manager’s questions are coercive.” *NLRB v. Delchamps, Inc.*, 653 F.2d 225, 227-228 (5th Cir. 1981).

A like conclusion is reached when evaluating whether a friendly supervisor has threatened an employee. “Friends can unlawfully threaten their friends,” *NLRB v. Big Three Industries Gas & Equipment Co.*, 579 F.2d 304, 311 (5th Cir. 1978), cert. denied, 440 U.S. 960 (1979), and unlawful threats can be held to have occurred whenever the supervisory statements pertain to employment changes which higher management will effect. In those situations an employee would naturally conclude that the friendly supervisor, “as a member of management, was conveying a message from his management superiors,” *J.T. Slocumb Co.*, 314 NLRB 231, 231 (1994), and “that there was some basis in fact for” the substance of that friendly supervisor’s warnings. *Gray Line of the Black Hills*, 321 NLRB 778, 792 (1996).

When she described the statements made to her by Davis, Knox appeared to be trying to do so truthfully. I credit her descriptions of his statements. Thus, during the conversation

after he had seen her talking to Radder, I conclude that Davis did enumerate the above-listed adverse consequences that would follow if Respondent's employees became unionized. There is no evidence that Respondent had ever considered, prior to commencement of the Union's campaign, making any of those changes – all of which would have been adverse to employment conditions, from employees' perspective. Even if Respondent had contemplated making one or another of them, there is no evidence that any of Respondent's employees, particularly Knox, had been aware of that contemplation. Accordingly, an employee would naturally perceive that the adverse changes enumerated to Knox by Davis would result solely from the employees' decision to select representation by the Union. Therefore, the employment changes listed by Davis to Knox constituted a threat and, as a result of his threat, Respondent violated Section 8(a)(1) of the Act.

So, also, did Davis impliedly threaten Jensen when he asked if she had been talking about the Union during a break and, when told that had not been the fact, retorted, "That's all I wanted to know." "[T]hreats in questioning need not be explicit if the language used ... can reasonably be construed as threatening." *NLRB v. Ayer Lar Sanitorium*, 436 F.2d 45, 49 (9th Cir. 1970). Accord" *Baker Mfg. Co. v. NLRB*, 759 F.2d 1219 (5th Cir. 1985).

As pointed out above, workplace-discussion of unionization is protected by Section 7 of the Act. Respondent has no rule against workplace discussion, save that which constitutes gossip about problems at home, constitutes hallway hollering, and distracts staff from watching children in their care. Davis expressed none of those concerns to Knox. Nor can his question to Knox and his retort to her answer fairly be interpreted or construed to have been addressed to any of those concerns. Certainly, there is no basis for an employee to subjectively understand that the question and retort were somehow rooted in any of those three concerns.

I conclude that Knox's placement of that conversation, as having occurred during June, was credible. In context, Davis's question and retort follow naturally from the sequence of events and conversations which she described, starting with her receipt of the subpoena. Neither Davis nor Hengemuhle disputed that subpoena-generated sequence of conversation and events. In consequence, Davis's question about Jensen and his retort to Knox's answer occurred at a time when, as concluded below, Respondent had already attempted to discourage support for the Union by scheduling a meeting to conflict with a meeting already scheduled by the Union and by prematurely granting a wage increase to all of its employees. Of more specific importance in connection with Davis's June question and retort, by then Respondent had unlawfully terminated Radder and Ryan, as also discussed below.

Absent a legitimate operations purpose for the question which Davis directed to Knox and for his retort to her answer to that question, an employee such as Knox would naturally conclude that Davis was implying that Respondent would also retaliate against Jensen for having discussed the Union. Inasmuch as Jensen's overtures to Knox had violated no legitimate work rule, and against a background of two prior unlawful terminations, I conclude that, by his question and retort, Davis impliedly threatened that Jensen also would be made the target of unlawful retaliation motivated by animus toward the Union and its supporters. By his implied threat against Jensen, Respondent violated Section 8(a)(1) of the Act.

With respect to the questioning of Knox by Davis, about what Radder had said to her and whether she had signed an authorization card, neither Davis nor Respondent has advanced a legitimate purpose for interrogation about those subjects. Knox and Davis were friends, but there is no evidence nor contention that Knox had been active, nor even openly supportive, on the Union's behalf prior to that questioning.

True, Davis questioned Knox in the hallway, as opposed to in an office. Still, he is Knox's immediate supervisor. There is no evidence that he had told her that she could refuse to answer his questions about union activities, without fear of reprisal for refusing to do so. Indeed, there is no evidence that Davis even assured Knox that she would not become an object of retaliation for whatever answers she did give to his questions. That latter point is a very significant one, in the circumstances. As concluded above, Davis made threats during that very conversation – about changes in employment terms, adverse to employees, should the Union succeed in become the bargaining agent of Respondent's employees. Beyond that, as concluded below, by the time of that interrogation of Knox, Respondent already had displayed a disposition to take action as a result of the Union's campaign: by scheduling a December 12 meeting timed to interfere with the Union's previously scheduled meeting on that date and, then, by prematurely granting a wage increase to all employees.

Given the totality of the foregoing circumstances, I conclude that a balance of considerations establishes that Davis's questioning of Knox had been coercive and, as a result of that interrogation, Respondent violated Section 8(a)(1) of the Act.

So, too, did Respondent violate Section 8(a)(1) of the Act when Casalenda told Jensen, as quoted in Section I.F., *supra*, "Jan is not here any longer. You are. You need to think about where you want to be a year from now or five years from now." Casalenda denied generally having threatened Jensen on March 10. But, Casalenda never denied having made those quoted statements to Jensen. Nor did Casalenda deny that she had made them in response to Jensen's expressed concern about "my involvement [being] the same as Jan's as far as being in the [U]nion there might be a possibility I might be asked to testify at some point or provide information". Indeed, Casalenda never denied that Jensen had made those remarks. Thus, it is uncontested that Jensen expressed concern about being called to testify or provide information, to which Casalenda retorted that Jensen should keep in mind that Radder "is not here any longer," and that Jensen should "think about where you want to be a year from now or five years from now."

As pointed out above, in connection with the testimony of Feldman, undenied testimony is entitled to a certain presumptive reliability, at least to the extent that there is no independent reason for disbelieving it. *MDI Commercial Services, supra*. It was my impression that Jensen was basically being candid when she testified, though it did seem at times, as described below in connection with her Spring conversation with Hengemuhle, that Jensen had not always paid as much attention to events and conversations as she could have paid while they were taking place and, moreover, that her recollection of events and conversations was not always perfect. However, those imperfections did not appear to exist with regard to her above-quoted remarks to Casalenda, nor with respect to Casalenda's above-quoted response to those remarks. Consequently, I credit Jensen's undisputed testimony about them.

In the circumstances of that Jensen-Casalenda exchange, it would be difficult for an employee to place any interpretation upon Casalenda's response other than one which constituted a warning of job loss should Jensen testify or give information during an investigation about the Union and Radder's discharge. After all, their conversation had begun with Jensen expressing concern that, as one of the Union's supporters, she might be the next – after Radder – to be fired because she, too, was a union supporter. To that expression of concern, Casalenda lawfully responded, in effect, that Jensen should not be worried so long as she did her job properly and followed Respondent's rules.

Seemingly, that same type of response could have been made by Casalenda when Jensen next expressed concern about having to testify or give information. Instead, Casalenda

responded by specifically referring to Jensen's future, telling Jensen that she should give thought to it. In contrast to her initial response to Jensen's expression of concern about being next, Casalenda's later, above-quoted, response made no mention of how Jensen did her job or observed work rules. Of itself, that very contrast in response would naturally heighten an employee's apprehension, arising from the substance of the "think about where you want to be" statement.

In sum, Jensen's conversation with Casalenda had occurred in the immediate wake of Radder's discharge. As concluded below, that discharge had been unlawfully motivated under the Act. The two women's discussion had started with Jensen's expression of concern about her own situation, given that she also supported the Union, in light of Radder's termination. To that Casalenda gave Jensen legitimate assurances that the latter could "cover" herself by doing her job. But, when Jensen expressed concern about having to testify or give information about the Union and Radder, Casalenda responded very differently, admonishing Jensen to give thought to her future. In those circumstances, I conclude that Casalenda's response constituted an implied threat to Jensen's job future, should Jensen testify or give information.

It may well be that, by her remarks, Casalenda had merely intended to give "friendly advice" to Jensen, motivated by no more than Casalenda's personal opinion. However, when evaluating allegations under Section 8(a)(1) of the Act, a supervisor's intentions are not determinative. "The employer's subjective intent and the employee's subjective reaction, however, are not dispositive." *NLRB v. Wis-Pak Foods, Inc.*, 125 F.3d 518, 524 (7th Cir. 1997). "The test is not the actual intent of the speaker or the actual effect on the listener." *Smithers Tire*, 308 NLRB 72, 72 (1992). Consistent with what has been said above, in connection with the discussion of threats by "friendly" supervisors, "warnings of Company retaliation cast as friendly advice from a familiar associate might be more credible, hence more offensive to [Section] 8(a)(1) than generalized utterances by distant company officials." *NLRB v. Big Three Industries Gas & Equipment Co.*, *supra*. See also, *NLRB v. Dover Corp.*, 535 F.2d 1205, 1209 (10th Cir. 1976), cert. denied, 429 U.S. 978 (1976); *Seligman and Associates, Inc. v. NLRB*, 639 F.2d 307, 309 (6th Cir. 1981).

True, Jensen, not Casalenda, had initiated the conversation and, in addition, had initiated the questioning which led to Casalenda's impliedly threatening response. But, employee-initiation, of itself, is no defense to an unlawful threat. See, *NLRB v. General Electric Company*, 418 F.2d 736, 755 (2d Cir. 1969), cert. denied, 397 U.S. 965 (1970); *NLRB v. Randall P. Kane, Inc.*, 581 F.2d 215, 218 (9th Cir. 1978). Moreover, the fact that a supervisor expresses only a personal opinion to an employee – something there is no evidence that Casalenda actually had said to Jensen: "in my opinion" or "I feel personally" – is no defense to a violation of Section 8(a)(1) of the Act where the supervisor's remark is "coercive." *Winkler Bros. Co.*, 236 NLRB 1371, 1372 (1978). See also, *L'Eggs Products, Incorporated*, 236 NLRB 354, 388 (1977), enfd. in pertinent part, 619 F.2d 1337 (9th Cir. 1980), and cases cited therein.

Therefore, I conclude that Casalenda did impliedly threaten adverse effects on Jensen's job should the latter give testimony or information in connection with the Union or Radder's termination. By virtue of that threat, Respondent violated Section 8(a)(1) of the Act.

That same conclusion is warranted with respect to some of Hengemuhle's later statements, described in Section I.H., *supra*, to Jensen. Hengemuhle admitted that, during that conversation, she had directed Jensen to remove the Union's newsletters from the front office. Jensen testified that Hengemuhle's direction had been to remove them from the building. As an analytical proposition, the difference is not significant.

Respondent has no rule against employee-distributions in McKnight Center nor, so far as the record shows, in that center's front office. Thus, the presence of the newsletters – which, after all, were one means for communicating about unionization to employees at their workplace – violated no legitimate prohibition imposed by Respondent. A direction to remove them suppresses the statutory right to communicate in the workplace. Moreover, it is a selective suppression since, so far as the evidence discloses, it had been the only occasion when any of Respondent's officials had banned distribution at a center and, of course, the newsletter had been published by the Union and placed at McKnight Center as a means of communicating with employees about unionization.

The fact that Hengemuhle may have been personally offended, even hurt or saddened, by remarks made in the newsletter's article concerning Radder is no justifiable basis under the Act for suppressing such communications. Indeed, were those reasons to supply justification under the Act, the allowable scope for employees to debate the merits of unionization, and about subjects arising from a unionization campaign, would be reduced considerably. Undoubtedly, most employers, and some unions as well, see, e.g., *Operating Engineers Local 400 (Hilde Construction Company)*, 225 NLRB 596, 602-605 (1975), enfd. mem. sub nom., *International Union of Operating Engineers Local #400, AFL-CIO v. NLRB*, 561 F.2d 1021 (D.C. Cir. 1977), would be offended by employee-criticisms of existing policies and work practices.

The fact is that the Supreme Court has set comparatively broad standards for both the content and the tenor of communications made during labor disputes, without excepting disputes arising as a result of an organizing campaign. "Labor disputes are ordinarily heated affairs," the Court has pointed out, but "the enactment of [Section] 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." (Footnote omitted.) *Linn v. United Plant Guard Workers*, 383 U.S. 58, 62 (1966). "Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language," (citation omitted), *Id.*, at 58, but such "freewheeling use of the written and spoken word ... has been expressly fostered by Congress and approved by the NLRB." *National Association of Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974).

Although the scope of speech protected during labor disputes is not without limitation, even "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth," *Linn v. United Plant Guard Workers*, 383 U.S. at 62, and that is not established by "exaggerated rhetoric," by "overenthusiastic use of rhetoric or the innocent mistake of fact," nor by "lusty and imaginative expression." *Letter Carriers v. Austin*, 418 U.S. at 277, 286.

Respondent has pointed to no statement in the "Action" newsletter's article on Radder which rises to the level of "deliberate or reckless untruth." Nor did Hengemuhle do so, either during her conversation with Jensen or when testifying. Indeed, any conclusion of "deliberate or reckless untruth" would be hard to reach in the face of Respondent's unlawfully motivated termination of Radder, as concluded below, and given the fact that Hengemuhle claimed to have been the official who made the decision to fire Radder. Therefore, I conclude that Hengemuhle's direction to Jensen to remove the newsletters interfered with and restrained the exercise of statutory rights and, as a result Respondent violated Section 8(a)(1) of the Act.

Hengemuhle's unlawful direction that Jensen remove the newsletters provides the basis for evaluating her admitted accompanying remarks to Jensen that she (Hengemuhle) took the article "personal," that it "hurt my feelings," and caused her to feel "very emotional." Had those statements been made in an isolated context, free of surrounding unlawful statements or conduct, any allegation concerning them likely would be dismissed. After all, they were no

more than expressions of Hangemuhle's opinion and, accordingly, are allowable under Section 8(c) of the Act. See, e.g., *Salvation Army Residence*, 293 NLRB 944, 944 (1989). As pointed out in footnote 6 of that decision, however, the situation differs when an employer accompanies such expression with an unlawful refusal to allow distribution of literature.

5 To be sure, Hangemuhle's refusal to allow continued dissemination of the newsletter took a less extreme form than what occurred in *Southland Knitwear, Inc.*, 260 NLRB 642 (1982). Still, the effect of the accompanying actions – by the employer there and by
10 Hangemuhle – were identical: employees were deprived of access to statutorily protected literature for no reason other than an employer's dissatisfaction with a union and the message which it was attempting to convey. Therefore, I conclude that, in such circumstances, Hangemuhle's negative expressions of opinion about the newsletter's article became the sole basis for the unlawful action of preventing distribution of union literature to employees and, in that context, Respondent further violated Section 8(a)(1) of the Act.

15 That same context provides a background for Hangemuhle's other accompanying statement about understanding that Jensen could engage in union activity before and after work, as well as during breaks. As Jensen acknowledged, Hangemuhle never said expressly that Jensen could not talk about the Union, nor engage in union activities, during work time,
20 although Davis would later seemingly say as much to Knox, as discussed above. Nevertheless, in making such a statement in conjunction with an unlawful direction to remove union literature from the building, or even from the front office, Hangemuhle implied that employees' union activities during work time were subject to her control and restriction. After all, actions do speak louder than words on many occasions.

25 In fact, the portion of Jensen's cross-examination reproduced in Section I.H., *supra*, demonstrates that, by her acts and words, Hangemuhle had confused Jensen as to when the latter would be free to engage in activity on behalf of the Union, free of Respondent's control and restriction. Hangemuhle may not have intended as much. But, as discussed above, her
30 intent is not the issue.

To the extent that Jensen was left confused by the ambiguity of Hangemuhle's remarks, that is a risk which Hangemuhle must bear as a consequence of her words and accompanying unlawful direction that Jensen remove the newsletters. Nor, as some questioning would seem
35 to imply, can Hangemuhle escape the results of her actions and words on the basis that she was doing no more than expressing a personal preference, rather than a mandate, as to when union activity should be conducted. Her words, in the context of her actions, did not require "mandatory phrasing" to be unlawful; she need only have created a "reasonable tendency ... to coerce employees in the exercise of fundamental rights protected by the Act." *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992), *enfd.*, 987 F.2d 1376 (8th Cir. 1993).
40

As demonstrated by Jensen's answers to questioning, she had been left confused by Hangemuhle's words and actions as to whether employees could engage in union activities during work time. Respondent has no rule prohibiting such activities. In fact, it seemingly has
45 no rule whatsoever concerning distribution of literature and discussions of non-work-related subjects by staff at its centers during work time. Therefore, in the totality of the circumstances presented, Hangemuhle's words about before and after work, and during breaks, naturally conveyed to an employee that union activities could be conducted during work time only so long as Hangemuhle did not disapprove of them.

A somewhat different situation is presented by Hangemuhle's statements about Jensen speaking only for herself. Jensen acknowledged that she had been the one to suggest that the

conversation be relocated from the hallway. Further, she agreed that she had been seeking information from Hengemuhle about unions and had been interested in Hengemuhle's personal opinion of them. Moreover, Jensen was never called to rebut Hengemuhle's testimony about Jensen having asked to "talk to you off the record." In fact, when she did testify, Jensen agreed that both she and Hengemuhle had agreed to speak only for themselves and "not speak on behalf of others" during that private conversation requested by Jensen. In light of the foregoing testimony, it is impossible to somehow conclude that Hengemuhle had been saying that Jensen should not be concerned with speaking for everyone else – unlawfully saying that Jensen should not serve as some form of spokeswoman for other employees.

Once out of the hallway, however, Hengemuhle acknowledged that she had said that Jensen should consider her own position and not be concerned about being a leader when it might turn out that potential followers might abandon her. Even so, Hengemuhle's words were consistent with the testimony of both women that, by that point, only an exchange of personal views was being exchanged between them. Hengemuhle's words did not constitute a direction to Jensen. Nor did Hengemuhle warn of any adverse employment conditions as a consequence of Jensen being revealed to Respondent as a spokeswoman for the other employees. To the contrary, Hengemuhle said no more than that employees might make the decision to abandon anyone who was trying to be their leader.

Of course, unlawful remarks were made during the overall conversation between Jensen and Hengemuhle. Nonetheless, remedies are provided for those other statements. In the context of Jensen's undisputed desire for a personal discussion with Hengemuhle and of their agreement to speak only for themselves – as opposed to on behalf of the Union and other employees, on the one hand, and on behalf of Respondent, on the other – there is no basis for concluding that an expression of opinion about one consequence of being a leader – of the necessity to, in effect, think first about "number one" – constitutes either an express or implied threat, or otherwise naturally coerced an employee in the exercise of statutory rights.

The final allegation arising from the Jensen-Hengemuhle conversation is that the latter had said that Respondent was engaging in surveillance of employees' union activities. Actually, Jensen admitted, Hengemuhle had never said that such surveillance was being conducted by Respondent. But, Hengemuhle never contested that, when Jensen had said that employee-meetings were being watched, she (Hengemuhle) had retorted, "So what?" Not only did she not dispute that description, but Hengemuhle gave internally contradictory testimony concerning that exchange, as described in Section I.H., *supra*. I credit Jensen's description of it.

Although Hengemuhle testified that she had no knowledge of surveillance being conducted by Respondent, her "So what?" retort conveys to an employee the natural impression that surveillance is occurring. For, such a response does not rise to the level of a denial. To the contrary, it inherently implies agreement with the assertion which generated that response. In consequence, an employee is left with the impression that, in fact, employees' meetings – which, so far as the evidence reveals, were being conducted only in connection with the Union's organizing campaign – were being watched by Respondent. Therefore, Hengemuhle's response to Jensen's assertion created the impression that Respondent was engaging in surveillance of employees' union meetings and, thereby, Respondent violated Section 8(a)(1) of the Act.

Were the foregoing unfair labor practices the only evidence of unlawful interference, restraint and coercion, there might be some basis for perhaps concluding that only an isolated group of supervisors – McKnight Center Director Hengemuhle and McKnight Center Supervisors Casalenda and Davis – were opposed to the Union, but that their opposition did not necessarily reflect Respondent's attitude toward the Union and its supporters. Yet, there is evidence of two instances when antiunion action was taken by higher echelons of management.

Employees are naturally led to conclude that their employer is trying to interfere with their union activities whenever that employer discloses that it is aware that an organizing campaign is in progress – as Dillon did through her "**RE: Union Organizing**" memo dated December 6 – and, then, schedules its own meeting for no seeming reason other than to create a conflict with a meeting already planned and announced by the union conducting that organizing campaign. That was the appearance resulting from Respondent's scheduling of the optional meeting on December 12. Of course, despite that appearance of impropriety, a conclusion of unfair labor practice would be negated by credible evidence showing that the employer's meeting had been scheduled on that date for reasons unrelated to the timing of the union meeting. But, Respondent has failed to present such evidence.

Executive Director Dillon – the official who made the presentation for Respondent at its December 12 optional meeting – denied that, when scheduling that meeting, she had known about the Union's meeting. That denial is not reliable, as discussed near the end of Section I.B., *supra*. Beyond that, Dillon never did explain how December 12 came to be selected for the optional meeting. Finance Director Thunder attempted to do so. At one point she claimed "center directors pretty much decided on that date." However, that testimony was never corroborated by present and former center directors who appeared as witnesses for Respondent: Sloan, Hockert and Hengemuhle. Further, it seems unlikely that center directors would have chosen a 5:00 to 6:30 meeting at one center on December 12, when they had to attend another meeting – the Center Committee, VIP Committee & Male Involvement one – at 6:00 p.m. on that same date at a different center.

At another point, Thunder asserted that December 12 had been "pretty much the drop dead date" for conducting such a meeting before Winter break started, after classes ended on December 20. Yet, her assertion does not square with three objective facts. First,

Respondent's own Staff Master Calendar for December reveals that there were other dates – December 11, 12, 17 and 18 – when no other events were scheduled, thereby relieving center directors of the above-mentioned December 12 conflict. Second, if the point of Respondent's December 12 optional meeting truly had been to announce wage increases, then that could have been accomplished on any date prior to conferral of those increases in December 20 paychecks – again, without presenting center directors with a potential conflict.

Third, it cannot be argued with persuasion that a meeting was necessary on December 12 – nor, for that matter, on any other date prior to Winter break – to announce the competency-based assessment and pay program. After all, attendance at the December 12 meeting had been optional and not all of Respondent's employees attended it. So far as the record discloses, no effort was made before Winter break to convey information about that program to employees who did not attend the December 12 optional meeting, such as by a memo to them explaining the program or, indeed, by conducting another meeting or meetings with small groups of employees before December 20.

Not reliable is testimony to the effect that conducting an optional meeting on December 12 and, then, another meeting on January 6 provided a means for reinforcing the message being conveyed to employees about the competency-based program. For, it is uncontroverted that employees who attended the optional meeting did not then attend the mandatory meeting on January 6 concerning that program. The January 6 meeting was conducted only for employees who had not attended the one on December 12. Accordingly, as an objective matter, the January 6 meeting provided no reinforcement about the competency-based program for employees who had attended the December 12. And, of course, there was nothing to reinforce for employees who did attend the January 6 meeting about the competency-based program.

In sum, Respondent has advanced no credible legitimate explanation for having selected December 12, from 5:00 to 6:30 p.m. at Fraser Center, for its optional meeting. As described in Section I.C., *supra*, the evidence shows that Respondent had selected December 12, as the date for that meeting, only after having learned about the Union's organizing campaign. As described in Section I.B., *supra*, it is a fair inference that Dillon and one or more of Respondent's other officials had learned of that campaign from one of the Union's flyers announcing the date and time of its meeting for Respondent's employees. Despite the prolonged and careful planning which had led to development of the competency-based program, the optional meeting was hastily decided upon – so hastily that the official most conversant with that program, Director of Education and Disability Services Marchessault, was not able to attend it because of a prior commitment to be elsewhere during that week. That optional meeting's "**! ANNOUNCEMENT !**" held out a prospect for employees to learn "how it might be possible to increase your wages." Obviously, such a prospect inherently would attract employees from attending the Union's meeting, given the lack of increases and the expressions of employee-concern about failure to receive them, as described in Section I.B., *supra*.

Respondent's abrupt decision to convene a meeting on December 12 has not credibly been shown to have been the result of legitimate reasons. So hastily convened a meeting would inherently convey to employees a connection between that meeting and the Union's previous announcement of a meeting on the same date, during roughly that same time of day. In fact, a preponderance of the above-described evidence supports the impression which the optional meeting's sudden announcement inherently conveyed to Respondent's employees: that Respondent had decided upon its own meeting as a vehicle to wean employees away from attending the now-conflicting Union meeting. Therefore, I conclude that by having decided to schedule its optional meeting to conflict with the previously scheduled meeting of the Union,

Respondent violated Section 8(a)(1) of the Act.

The second instance of antiunion conduct by Respondent's upper management echelon was the wage increase conferred on all employees through their December 20 paychecks. At the outset, it must be said that there is no credible basis for concluding that Respondent had not intended to confer wage increases on all employees. I do not credit any testimony about statements to that effect. Events during the Fall – absence of wage increases for over a year, employee-expressions of dissatisfaction about not having received increases, reorganization of the transportation component, prospect of increased Head Start funding, Federal requirements about allocation of Head Start funding to employees – all objectively show that it would have been unlikely that Respondent would not have been planning to grant wage increases eventually during the 1996-1997 school year.

The fact that an employer has made a decision to confer a benefit, such as increased wages, does not of itself relieve a trier of fact from the obligation of evaluating evidence concerning whether that employer toyed with “the timing, the content and the manner” of conferring that benefit so that it undermines a union's recently revealed organizing campaign. *Kellwood Co., Ottenheimer Bros. Manufacturing Division v. NLRB*, 411 F.2d 493, 497 (8th Cir. 1969). For Section 8(a)(1) of the Act prohibits “conduct immediately favorable to employees which is undertaken for the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect.” *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Of course, the earlier during an organizing campaign that a previously planned benefit can be conferred, the greater the possibility of preventing a union's campaign from gaining momentum, as pointed out in *NLRB v. Jamestown Sterling Corp.*, *supra*, and in *Randolph Division, Ethan Allan, Inc. v. NLRB*, *supra*. Consequently, “[p]redetermination alone is not determinative, [but] the timing of the announcement must also be considered.” *NLRB v. Arrow Elastic Corporation*, 573 F.2d 702, 706 (1st Cir. 1978).

As described in Section I.D., *supra*, Thunder testified that she had not known with confidence until early December, when she had received the December 2 “PROGRAM INSTRUCTION”, what specific Federal funding would be made available to Respondent for wage increases. She further testified that, in the ordinary course of affairs, it “would be really pushing it” to “actually get the increase[s] to employees” within 30 days following notification to Respondent of actual Federal funding which it would be receiving. Based upon her testimony, it is objectively unlikely that, in the ordinary course, Respondent would have conferred wage increases on December 20 when it had received notification of its Federal funding no more than three weeks earlier.

Of course, it did so and its witnesses claimed generally that a special effort had been made to confer the increases as soon as possible. Yet, as an objective matter, such a claim is based upon testimony which was internally contradictory and inconsistent with objective considerations. Thunder described a meeting with center and component directors by which supposedly “the final figures for specific increases” had been “in place.” However, such a meeting could only have taken place a few days after Respondent had received the “PROGRAM INSTRUCTION”. It is somewhat implausible to believe, in the fact of that timing, that Thunder could have “final figures” so soon after receipt of firm notice of actual Federal funding, especially given the complexities involved in calculating individual 1996-1997 school year increases.

The objective unreliability of Thunder's testimony concerning the events leading to the December 20 increases was heightened by her initial testimony that she had brought to that meeting, with center and component directors, two documents which were an integral part of

discussion during that meeting. However, as pointed out in Section I.D., *supra*, it turned out that neither document had been printed out until, at least, December 12 – the date of the optional meeting purportedly agreed upon by center directors during that same meeting. Thus, Thunder’s description of the sequence of events supposedly leading to the wage increase conferral decision is so flawed that it cannot be accorded reliance.

In fact, as they testified about the wage increase, Thunder and Respondent’s other witnesses did not appear to be doing candidly. To be sure, they had for some time wanted to confer the increase as soon as possible. But, doing so as early as December 20 has not credibly been shown to have been a decision which was made until after Respondent became aware that the Union was attempting to organize Respondent’s employees. In what can only be regarded as an extraordinary departure from its usual past timetable, and one not credibly shown to have occurred absent discovery of the Union’s campaign, Respondent rammed through the increases before the Winter break. That timing – in connection with acquisition of knowledge about the Union’s campaign and, also, in contrast to the usual period it took for implementing wage increases – is a “stunningly obvious” indication of suspect motive. *NLRB v. Rubin*, 424 F.2d 748, 750 (2d Cir. 1970) – “of a cause-and-effect relationship” between learning about the Union’s campaign and the exceedingly hasty increases which followed acquisition of that knowledge. *NLRB v. Adams Delivery Service*, 623 F.2d 96, 99 (9th Cir. 1980). See generally, discussion of timing as an analytical factor in *Handicabs, Inc.*, *supra*, 318 NLRB at 897.

That connection would not likely elude notice by Respondent’s employees: they had been complaining throughout Fall about lack of increases, they had received Dillon’s December 6 “MEMO” acknowledging Respondent’s knowledge of the Union’s campaign, fourteen days later they all received increases, sometimes of amounts that were quite significant. By granting increases early during the organizing campaign, Respondent might be able to cool the ardor of employees for representation before that campaign gained momentum. For, the increases inherently demonstrated that employees did not need representation to obtain increases which they had been seeking. Further, during the Winter break, operations employees would be relieved of their duties, leaving an opportunity for the Union’s activists to devote more time, than ordinarily available to them, to contacting coworkers on the Union’s behalf. Granting a wage increase before that break would inherently blunt any message which those activists might convey to employees wavering on whether or not to support the Union.

While it is perhaps not necessary to discuss the subject, nevertheless it should be pointed out that only tangential relation existed between the December 20 increases and the competency-based program. True, pay rates are specified in the latter and those rates represent increases over rates being paid prior to December 20. Even so, Respondent was planning to grant increases – based upon savings from reorganization of the transportation component and upon increased Federal funding – even had there been no competency-based program nearing finalization. That is most graphically shown by the fact that the Federal Government would have required increases and by the further fact that Respondent conferred increases on its entire staff, even support staff not covered specifically by the entire competency-based assessment and pay program.

In the circumstances, it is difficult to conclude other than that the decision to even convene a December 12 optional meeting had been abruptly made to dissuade employees from supporting the Union, by unveiling a new program which provided hourly rate increases, as the “**! ANNOUNCEMENT !**” promised, and, in addition, as a subterfuge intended to lend a seeming aura of legitimacy to premature conferral on December 20 of wage increases which eventually would later have been conferred in the ordinary course of events. Indeed, any connection

sought to be created by that subterfuge was unmasked by Dillon when she admitted that, “There weren’t any pay increases announced at that meeting” on December 12, as described near the beginning of Section I.D., *supra*. Beyond that, had the December 12 meeting been so integral a component of the December 20 increases, left unexplained is why Respondent made
 5 no effort to alert employees who did not attend that meeting about the supposed source of pay increases which all received eight days later.

I conclude that employees likely would not miss the connection between revelation to Respondent of the Union’s organizing campaign and the long-sought wage increases which
 10 Respondent conferred two weeks after Dillon issued her memo concerning that campaign. Respondent has failed to credibly show that the increases would have been conferred so soon as December 20 in the ordinary course of affairs, had it not learned about that campaign. Respondent’s other unlawful conduct demonstrates its willingness to resort to unfair labor
 15 practices to dissuade employees from supporting the Union. Therefore, a preponderance of the credible evidence establishes that the wage increases had been granted on December 20 as a vehicle for discouraging employee-support for the Union and by prematurely granting those wage increases, Respondent interfered with its employees’ exercise of statutory rights, thereby violating Section 8(a)(1) of the Act.

This leaves for resolution the allegedly unlawful discharges of Ryan on February 20 and of Radder on March 7. As pointed out in Section I.F., *supra*, the crucial resolution to be made concerning those allegations is the state of mind of the decision-maker – in both instances, seemingly Hengemuhle. The methodology for doing so is that set forth in *Wright Line*, 251
 20 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), as modified in *Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276-278 (1994). See, *Rose Hills Mortuary L.P. d/b/a Rose Hills Company*, 324 NLRB No. 75, slip op. at
 25 footnote 4 (September 22, 1997).

With regard to Radder, as described in Section I.B., *supra*, he had been the employee who made contact with the Union and, thereafter, became its leading proponent among Respondent’s employees. There can be no question of Respondent’s knowledge of that fact. As described near the end of Section I.C., *supra*, and as discussed above, Davis told Michelle
 30 Knox that he had heard that Radder “has been trying to go around to get people to join a union.” Hengemuhle would ultimately admit, after initially denying that she had known about Radder’s union activities before discharging him, that receptionist Sanford had told her before
 35 March 7 that Radder had been trying to get employees to sign authorization cards. Obviously, her internally contradictory testimony concerning that subject is one illustration of the unreliability of Hengemuhle’s testimony and, in fact, it was my impression that she was not
 40 generally testifying with candor.

The unfair labor practices concluded to have been committed by Respondent are strong indicators of its animus toward unionization of its employees and, as well, toward employees supporting that effort. *Carry Companies of Illinois*, 311 NLRB 1058, 1060 (1993). Indeed, such
 45 hostility evidences more than that. “Inference of an employer’s unlawful motive [toward an employee] may be drawn from the employer’s hostility toward the union.” *Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991). Further indicia of unlawful motive for Radder’s discharge is supplied by his leading role in the Union’s campaign, by the fact that his termination occurred while an organizing campaign had been in progress, and by the facts that he was abruptly fired without being afforded an opportunity to explain to Hengemuhle his side of the hallway events which had occurred earlier that same day, as well as without being afforded an opportunity to explain the facts underlying the asserted January 14 warning memo. See, *Handicabs, Inc.*,

supra, 318 NLRB at 897, and cases cited therein.

The testimony of Respondent's officials, advanced to establish a legitimate reason for having fired Radder, was marred by internal contradiction and inconsistencies, both among
 5 their accounts and between some aspects of those accounts and objective considerations. With regard to being alone with children, there can be no question that Respondent has a well-publicized rule against staff being alone with a child. Yet, although Knox seemed to feel that the rule is applied rigidly, the evidence concerning its application shows that that rule had not
 10 been applied all that rigidly.

For example, when Radder left the high five classroom on March 7, to walk two children to the bathroom, left alone in that classroom had been assistant teacher Allen. But, there is no evidence that Hengemuhle even had inquired about that fact, nor that Respondent made an issue of that seeming breach by Allen of the rule. Nor is there evidence that Hockert had said
 15 anything to the teacher encountered walking alone in the hallway with four children, at Glendale Center, less than two weeks after Radder's discharge. Beyond that, Casalenda never disputed having been alone with a child in a McKnight Center bathroom, about a week after Radder's discharge. Nor was ongoing accompaniment provided to Timander during the two hours after her assistant teacher had left ill, though it is undisputed that Casalenda had known that no one
 20 was with Timander. Perhaps more significantly, as pointed out near the end of Section I.F., *supra*, and as quoted more fully in Section I.E., *supra*, Health and Nutrition Services Assistant Townsend conceded that there were occasions when staff would likely be alone with children. That was one reason why first aid and CPR training were so important.

Even had the rule against being alone with children been applied so rigidly as Knox appeared to believe was the fact, there is ample basis for doubting that Radder actually violated it on March 7, while walking two children to the bathroom. After all, he had been walking them in a hallway in plain sight of receptionist Sanford and two other people standing by the reception cubicle. There can be no question about the truth of Radder's testimony in that
 30 regard: Hengemuhle conceded as much to Jensen during their later conversation described in Section I.H., *supra*. True, those three people may not have been watching Radder walk the children down the hallway. But, the rule prohibits being alone with children; it does not require that a staff member be watched when with children. Of course, by not affording Radder the opportunity to make that point during his termination meeting, Hengemuhle avoided having to
 35 address it while firing Radder.

That weakness in Respondent's position may have been what led Hengemuhle to admit that she would not have fired Radder for the events of March 7 – an admission which tends, at least, to put to rest any argument that Radder's purported infraction had been so severe that, of
 40 itself, it warranted termination. Instead, Hengemuhle abruptly produced for Radder on March 7 a supposed warning memo dated January 14 and assertedly issued for two head injuries suffered by children in Radder's care.

As reviewed in Section I.F., *supra*, a number of facts serve objectively to cast doubt on that validity of that warning memo and on the reasons for its purported issuance prior to March
 45 7. No action was taken against Radder for any of the three post-January 14 injuries to children in his care, even though that warning memo warns that "appropriate action" would "result" if there were added injuries. Nothing adverse was said to Radder about the December 13 head injury sustained by a child getting onto the bus, even though Respondent now contends that that had been the first of the two injuries to which the warning memo refers. To the contrary, then-Center Director Sloan complimented Radder for his handling of that situation. The child injured on January 8 had been in the immediate care of Bullock who – under procedures

acknowledged by Townsend – should have been the one to prepare the incident and injury reports, but did not do so. In fact, despite her two days off after January 14, Casalenda still was able to issue a speed or Speedy memo to Bullock, as a verbal warning. Given that fact, it is simply not credible that, had it been warranted at that time, she would not have been able to find time to simply give the warning memo to Radder, had that been Sloan's intention on January 14.

I do not credit Respondent's testimony concerning issuance of a warning memo to Radder on January 14. Nor do I credit the testimony concerning the assertedly legitimate reason for terminating Radder on March 7. The testimony of Respondent's officials – Hengemuhle and Casalenda – and of former center director Sloan were not advanced with candor. Their accounts were at some points internally contradictory, at other points not consistent with each other's accounts, and at many points not consistent with objective considerations. As a result, Respondent has failed to present credible evidence to serve as a defense either to the alleged unlawfully motivated warning memo or to the discharge of Radder. In the final analysis, the warning memo appears to have been a document hastily generated on March 7, without care as to the accuracy of what it recites and the supposed circumstances which purportedly had led to its January preparation, to shore up a discharge decision which, itself, was not legitimately supportable.

Radder was a leading supporter of the Union. Respondent harbored hostility toward the concept of unionization of its employees and engaged in unfair labor practices to discourage its employees from supporting the Union. No credible defense has been supplied to reliably explain supposed issuance of a warning memo to Radder on January 14, nor to explain reliably a legitimate reason for Radder's March 7 discharge. Therefore, a preponderance of the credible evidence leads to the conclusion that both had been unlawfully motivated and violated Sections 8(a)(3) and (1) of the Act. That conclusion warrants discussion of two other points in connection with Radder.

Initially Respondent took the position that head teachers, such as Radder, are supervisors within the meaning of Section 2(11) of the Act. As the hearing progressed, and as the evidence unfolded, such a conclusion became more and more remote. Indeed, some of Respondent's own officials made no mention of head teachers in the course of testifying about the supervisors at its centers. In the end, the most that can be said is that head and assistant teachers work together in developing plans for class activities. Aside from that function, the evidence is undisputed that head teachers exercise none of the other supervisory powers enumerated in Section 2(11) of the Act.

As to class planning, it should not be overlooked that students attending Respondent's centers are pre-schoolers. It hardly can be said that any instruction provided them rises to the level provided to primary and secondary school children. To be sure, the importance of those teachers' duties should not be deprecated. Neither should it be elevated through over-generalization to an unwarranted level. Whatever instruction they provide is inherently limited by the children's ages. There is no evidence that any of Respondent's teachers make such decisions as deciding courses to be offered, deciding when courses will be scheduled or deciding for whom the pre-school services will be provided. Cf., *NLRB v. Yeshiva University*, 444 U.S. 672, 686 (1980). Nor is there evidence that Respondent's head teachers issue grades to the children or set some sort of matriculation standards. Thus, it is difficult to conclude that the work involved is other than routine and so, too, is any authority exercised in connection with planning it.

The fact is that the head and assistant teachers in a classroom appear to work together and to jointly plan each day's class activities. There is no evidence that a head teacher ever has flatly overruled an assistant teacher's suggestion and rigidly obliged the assistant to follow that head teacher's direction. Beyond that, there is no evidence that Respondent would endorse an effort by a head teacher to impose direction on that head teacher's assistant, nor upon any other staff member: driver, advocate, etc. Cf., *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 575 (1994).

In sum, there simply is no basis for concluding, based upon the evidence presented, that head teachers possess any authority to exercise other than routine judgment in connection with activities of children at Respondent's centers. When evaluating supervisory contentions, the Board has held that such status must not be found so cavalierly that persons who, in reality, are employees end up deprived of the Act's protection. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). Supervisory status also should not be so lightly concluded to exist that employers end up saddled with liability under the Act for conduct by persons who, in reality, are not supervisors, but instead are statutory employees. See, *Hydro Conduit Corporation*, 254 NLRB 433 (1981). Based upon the totality of the evidence, I conclude that it has not been established that Radder had been a statutory supervisor while servicing as head teacher for Respondent.

The other point about Radder pertains to his suitability for reinstatement. Respondent developed evidence showing that, to an extent, his educational background might be viewed as somewhat unorthodox. Yet, Respondent hired him during 1995 with knowledge about his educational background. Moreover, while employed by Respondent, Radder was pursuing whatever course was needed to satisfy government requirement for his position as head teacher. If that ultimate goal was aborted by his unlawfully motivated termination, then that is Respondent's own fault and it must accord him the opportunity to complete whatever requirements are necessary to become fully qualified as a head teacher. See, *Koronis Parts, Inc.*, 324 NLRB No. 119, slip op. JD at 42 (October 10, 1997).

As to the discharge of Rose Ryan on February 20, she had been terminated less than a month after having signed one of the Union's authorization cards and, chronologically, in the relative middle of Respondent's ongoing unlawfully-conducted campaign against unionization of its employees: after a meeting with employees had been unlawfully scheduled to conflict with a meeting announced for them by the Union, after wage increases had been prematurely conferred on all employees to discourage their union support, and after one of its center supervisors had unlawfully interrogated and threatened an employee with adverse consequences should Respondent's employees become represented, but before it unlawfully discharged the Union's leading activist, before Casalenda's unlawful threat to Jensen, before Jensen became a target of unlawful statements by Hengemuhle, and before a center

supervisor impliedly threatened retaliation against Jensen for having advocated support for the Union in the large muscle room. Furthermore, viewed objectively, what defense was presented to Ryan's termination turns out to be incomplete and at odds with the undisputed and other objective facts disclosed by the record.

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As to the latter, presumably it had been McKnight Center Director Hengemuhle – the same official who ostensibly would make the unlawful decision to terminate Radder – who made the decision to terminate Ryan. At least, she is the official who authored the one page “MEMO” read and given to Ryan on February 20. But, Hengemuhle never testified about her reason for having decided to fire Ryan. Thus, with respect to that reason, the record is left with no more than what is contained in the “MEMO”.

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As to its recitation of fact, that “MEMO” is somewhat accurate. By February 20, Ryan had missed three – not merely “both” – training sessions. But, it is undisputed that her immediate supervisor, McKnight Center Supervisor Davis, had excused Ryan from having to attend the November 16 first aid training session. It is also uncontradicted that Ryan had presented a “doctor’s notice” reciting that she had been ill at the time of the December 7 CPR training session and, moreover, that Davis had accepted that written explanation without further remarks being made to Ryan about not having been present at that session. In consequence, based upon that uncontested evidence – which both Hengemuhle and, especially, Davis could have refuted, had that been possible, inasmuch as both officials appeared as witnesses after Ryan – by February 20 Ryan had missed but one training session – the first aid one conducted on February 8 – without excuse.

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Of course, given the importance of first aid and CPR training, it is objectively conceivable that an employer might feel obliged to fire an employee who failed, for whatever reason, to undergo such required training. Analysis in that respect would be parallel to that applied by the Board to a situation where an absence-prone employee had seemingly valid reasons for each of his absences: “Even where an employee may report the reasons for continued absence, or may have what appear to be justifiable excuses for such absences, an employer may well decide that an absence-prone employee is of no value to his business.” *Maryland Cup Corp.*, 178 NLRB 389, 390 (1969). Yet, the situation here precludes application of such an analytical analogy.

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As pointed out in Section I.E., *supra*, not only do Townsend’s lists show that other employees had missed scheduled first aid and CPR training sessions during the 1996-1997 school year, but they reveal that Tuesday Rendon had missed the same November 16, December 7 and February 8 sessions as had Ryan. But, there is no evidence showing that Rendon, like Ryan, had been terminated following absence from the February 8 session. To the contrary, Rendon was afforded the opportunity to attend March training, thereby evidencing that she, unlike Ryan, continued to be employed by Respondent, despite missing all training sessions from November through February. Respondent never explained why Rendon and Ryan had been treated disparately.

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Any argument about Ryan having failed to follow the procedures set out in Davis’s January 17 memos, when she realized that she would not be able to attend first aid training on February 8, collapses in light of one significant consideration: Respondent presented no testimony or other evidence that such a failure had even influenced Hengemuhle’s decision to discharge Ryan. No reference to those memos by Davis appears in the “MEMO” read and given to Ryan on February 20. Neither Hengemuhle nor Davis testified that failure to observe those memos’ procedures had even been considered in the course of arriving at the decision to fire Ryan. Certainly, I cannot supply such a defense for Respondent. It is well-settled that

existence of a legitimate reason for discipline is not a valid defense, to allegedly unlawful motivation, where that reason is never advanced. *Monroe Mfg.*, 323 NLRB No. 2, slip op at 4 (February 25, 1997). The Board has made plain that it does not allow its administrative law judges to supply defenses, based upon their subjective feelings, which are not advanced by respondents. *Norris/O'Bannon*, 307 NLRB 1236, 1242 (1992), and cases cited therein.

There is no basis for concluding that the explanation provided in Hengemuhle's February 20 "MEMO" is a reliable one. Beyond what is contained in that memo, Respondent has presented no testimony or other evidence which would provide a legitimate reason for terminating Ryan on February 20. Still, that hardly concludes analysis of the allegation concerning the motivation for her discharge on that date. Even where an unreliable defense is advanced, that unreliability is not necessarily dispositive of the ultimate issue of whether the true or actual motivation had been unlawful under the Act. See, e.g., *Society to Advance the Retarded and Handicapped, Inc.*, 324 NLRB No. 50, slip op. at 2 (August 22, 1997).

As pointed out in Section I.A., *supra*, the most significant issue posed by Ryan's discharge is the absence of direct evidence that Respondent had known that she had signed a card authorizing the Union to represent her, the only union activity in which she had engaged. Certainly, the conflicting, inconsistent and unsupported testimony of Radder and Ryan concerning Lawrence, discussed in Section I.E., *supra*, cannot be relied upon to provide such direct evidence. Nonetheless, while knowledge of union support is a prerequisite to concluding that antiunion animus had motivated adverse employment action, evidence of knowledge, or at least of belief, *Handicabs, Inc.*, *supra*, 318 NLRB at 897, and cases cited therein, need not be direct.

Such evidence can be inferred. "This 'knowledge' need not be established directly, however, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn." (Citation omitted.) *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995). Accord: *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380, 1384 (8th Cir. 1980); *Webco Bodies, Inc. v. NLRB*, 595 F.2d 451, 454 (8th Cir. 1979); *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993), cert. denied, 511 U.S. 1003 (1994). Here, a number of factors support a conclusion that Respondent knew, or likely knew or believed, that Ryan had signed a card authorizing the Union to represent her.

First, Ryan signed the card while standing with Radder in an open area: on the sidewalk in front of McKnight Center's main entrance. Thus, while there is no reliable evidence that Center Supervisor Lawrence had seen Ryan doing so, certainly anyone else could have observed Ryan sign the card – from another location outside of McKnight Center or through a window from inside of that center – without either Ryan or Radder being aware that they were being watched.

Second, as pointed out in Section I.E., *supra*, Ryan supplied an alternative plausible explanation for what an observer might infer from watching her sign something for Radder: "passing our numbers". Of course that testimony, which hardly helps Ryan's situation in this proceeding, is some indication that Ryan was not so unreliable a witness as portrayed by Respondent. Even considering that alternative explanation, it should not escape notice that the Union's authorization cards were not unfamiliar to personnel at Respondent. A card had accompanied each of the Union's flyers which were distributed during early December, as described in Section I.B., *supra*. Indeed, as concluded in that same section, even Executive Director Dillon had been made aware of the Union's flyer and, given that conclusion, likely of the appearance of the card which accompanied each flyer. Indeed, Davis specifically asked Knox if she had signed such a card, as described in Section I.C., *supra*, and as discussed

above.

Third, there simply is no evidence that any “dating” relationship had existed between Radder and Ryan, nor that anyone at Respondent had suspected that such a personal relationship existed between them. But, there is evidence that Respondent had known that Radder was an activist for the Union and was soliciting employees’ signatures on authorization cards. In addition to the remarks to Knox by Davis, mentioned in the preceding paragraph, Hengemuhle – the official who ostensibly had made the decisions to fire both Ryan and Radder – eventually conceded that she had been told that Radder had been soliciting employees’ signatures on authorization cards, by receptionist Sanford. In consequence, rather than providing a basis for an assumption that Ryan had been writing down her phone number for Radder on January 29, the more objectively plausible inference that any watcher would draw is that Ryan was signing one of the Union’s authorization cards which Radder had been circulating among employees for signature.

Fourth, there is evidence that, at least to some extent, supervisors had been watching for union activity among Respondent’s employees. As described in Section I.C., *supra*, Davis had been quick to question Knox about what she had been discussing with Radder. Moreover, as described in Section I.H., *supra*, and as discussed above, during her Spring conversation with Jensen, Hengemuhle never contested Jensen’s assertion that Respondent had been watching employees’ meetings. If so, it is unlikely that they had been ignoring conversations between those who were identified activists for the Union, such as Radder, and their coworkers, as the Davis-Knox conversation illustrates.

Finally, the very unreliability of Respondent’s defense to Ryan’s termination, as discussed above and in Section I.E., *supra*, lends support to an inference that there was some concealed reason for having fired Ryan. The only such reason which can be discerned from the record is Ryan’s act of having signed an authorization card. That provides some reinforcement for an inference that Respondent became aware that Ryan had done so. Indeed, as pointed out in connection with Jensen’s contacts with the Department of Labor, described in Section I.B., *supra*, word seems to travel around at Respondent, even though seemingly no effort is made by those involved to spread it.

The totality of the foregoing consideration supply ample basis for an inference that Respondent had known, or at least had suspected, that Ryan had signed an authorization card given her by Radder. As concluded above, Respondent had opposed unionization of its employees and, further, had not been reluctant to resort to unfair labor practices to discourage its employees from supporting the Union. Ryan’s union support had not been extensive, but her discharge naturally tended to send to her coworkers the very “*in terrorem*” message identified in *Rust Engineering Co. v. NLRB*, 445 F.2d 172, 174 (6th Cir. 1971) – “by making ‘an example’ of [one] of them.” *NLRB v. Shedd-Brown Mfg. Co.*, 213 F.2d 163, 175 (7th Cir. 1954).

Within approximately two week of Ryan’s discharge, Respondent also discharged leading Union activist Radder. The decision to effect his termination had been ostensibly made by the same official – Center Director Hengemuhle – as who the one who ostensibly decided to fire Ryan. As concluded above, a preponderance of the credible evidence establishes that the motivation for Radder’s termination had been unlawful. Respondent’s defense to Ryan’s termination is no less unreliable, especially in light of the uncontroverted February 20 statements by Davis that Ryan had been “a very good teacher” for whom he was willing to provide “a good reference”. In view of the totality of the foregoing circumstances, I conclude that a preponderance of the credible evidence gives rise to an inference that Respondent knew, or likely knew or suspected, that Ryan had signed an authorization card and, moreover, fired

her for having done so and to discourage other employees from supporting the Union, by demonstrating what could happen to union supporters, thereby violating Sections 8(a)(3) and (1) of the Act.

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Conclusions of Law

Parents in Community Action, Inc. has committed unfair labor practices affecting commerce by issuing a warning memo to and discharging Jan Radder and by discharging Rose Ryan, in violation of Sections 8(a)(3) and (1) of the Act, and by coercively interrogating employees about their union activities and those of their coworkers; by threatening that if employees chose to become represented by Minnesota Federation of Teachers they would be subjected to deteriorating working conditions, such as loss of paid holidays, parents being unable to become assistant teachers without teaching degrees or certificates, elimination of year-end personal and sick leave, and being required to start punching a timeclock; by threatening to retaliate against employees for discussing the above-named union while working, in the absence of a valid rule prohibiting discussions during work time; by threatening adverse consequences to an employee's future if she gave testimony or information concerning the above-named union or concerning the unlawful termination of a coworker; by prohibiting distribution of union literature at McKnight Center in the absence of a valid work rule restricting distribution of literature; by telling an employee that union literature may not be distributed because statements in it are personally offensive to a center's director; by telling an employee that union activities could be conducted during work time only so long as the center director did not personally disapprove of them; by creating the impression of surveillance of employees' union activities; by scheduling a meeting with employees timed to conflict with a meeting of employees previously scheduled by the above-named union; and by prematurely conferring wage increases to discourage employees from supporting the above-named union. However, it has not violated the Act in any other manner which has been alleged.

Remedy

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Having concluded that Parents in Community Action, Inc. has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to, within 14 days from the date of this Order, offer Jan Radder and Rose Ryan full reinstatement to the same positions from which each was unlawfully discharged, on March 7, 1997 and on February 20, 1997, respectively, dismissing, if necessary, anyone who may have been hired or assigned to perform their jobs after their unlawful discharges. If one or both of their jobs no longer exists, he or she will be offered employment in a substantially equivalent position, without prejudice to seniority or other rights and privileges which he or she would have enjoyed but for the unlawful discharges. Moreover, it shall make Radder and Ryan whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It also shall, within 14 days from the date of this Order, remove from its files the warning memo dated January 14, 1997 assertedly issued to Jan Radder and, in addition, remove from its files any reference to the unlawful discharges of Jan Radder on March 7, 1997, and of Rose Ryan on February 20, 1997, and within 3 days thereafter shall notify each of them in writing that this has been done and that the warning memo for Radder and the discharges of Radder and Ryan shall not be used against them in any way.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record

and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:¹¹

ORDER

5 Parents in Community Action, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

10 (a) Coercively interrogating employees about their activities on behalf of and support for
Minnesota Federation of Teachers and the activities of their coworkers; threatening that
selection of that union as their bargaining agent would subject employees to adverse working
conditions, such as loss of paid holidays, preventing parents from becoming assistant teachers
without teaching degrees or certificates, elimination of year-end personal and sick leave, and a
requirement that employees punch timeclocks; threatening to retaliate against employees for
15 discussing a union while working, in the absence of a valid rule prohibiting work time discussion
of nonwork subjects while working; threatening that an employee could be discharged for giving
testimony or information concerning a union or concerning the unlawful termination of another
employee; prohibiting distribution of union literature at a center in the absence of a valid work
rule restricting distribution of literature there; telling employees that union literature may not be
20 distributed because some of its statements are personally offensive to a center's director; telling
employees that union activities are allowed during work time only so long as the center director
did not personally disapprove of them; creating the impression of surveillance of employees'
union activities; scheduling a meeting with employees timed to interfere with a union's already
scheduled meeting with those employees; and, prematurely granting wage increases to
25 employees to discourage them from supporting a union organizing campaign.

(b) Issuing warning memos to, discharging or otherwise discriminating against Jan
Radder, Rose Ryan or any other employee because of support for the labor organization
named in the preceding subparagraph, or because of support for any other labor organization,
30 and as a means for discouraging other employees from supporting a union.

(c) In any like or related manner, interfering with, restraining or coercing employees in
the exercise of rights guaranteed them by Section 7 of the Act.

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¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Jan Radder full reinstatement to the position of head teacher from which he was discharged on March 7, 1997, and offer Rose Ryan full reinstatement to the position of assistant teacher from which she was discharged on February 20, 1997, or, if either of those positions no longer exist, to a substantially equivalent position, without prejudice to seniority or any other rights and privileges which would be enjoyed had those unlawful discharges not been made.

(b) Make Jan Radder and Rose Ryan whole for any loss of earnings and other benefits suffered as a result of the discrimination against each of them, in the manner set forth in the Remedy section of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d) Within 14 days from the date of this Order, remove from its files the warning memo dated January 14, 1997, which was issued to Jan Radder and, in addition, any reference to the discharges of Radder on March 7, 1997, and of Rose Ryan on February 20, 1997, and within 3 days thereafter notify Radder and Ryan in writing that this has been done and that the warning memo and discharge will not be used against Radder in any way, and that the discharge of Ryan will not be used against her in any way.

(e) Within 14 days after service by the Region, post at all of its Hennepin County, Minnesota child care centers copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by its duly authorized representative, shall be posted by Parents in Community Action, Inc. and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, Parents in Community Action, Inc. has gone out of business or closed any of the child care centers involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at closed centers at any time since December 6, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

¹² If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the Complaint in Case 18-CA-14406 be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein and, further, that the Complaint in Case 18-CA-14484 be, and it hereby is, severed and dismissed in its entirety.

5 Dated: Washington, D.C. July 15, 1998

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WILLIAM J. PANNIER III
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this Notice.

The National Labor Relations Act gives all employees the following rights:

- To organize
- To form, join or assist any union
- To bargain collectively through any representative of their own choice
- To act together for mutual aid or protection
- To choose not to engage in any of those protected concerted activities.

WE WILL NOT coercively interrogate you about your activities on behalf of nor your support for Minnesota Federation of Teachers, and WE WILL NOT interrogate you about the activities and support of that union by your coworkers.

WE WILL NOT threaten that selection of that union, or any other union, will subject you to adverse working conditions, such as loss of paid holidays, preventing parents from becoming assistant teachers without teaching degrees or certificates, elimination of year-end personal and sick leave, and requiring that you begin punching timeclocks.

WE WILL NOT threaten to retaliate against you for discussing a union while working, when we have no valid rule prohibiting worktime discussion of nonwork subjects while working.

WE WILL NOT threaten that you can be discharged for giving testimony or information concerning a union or concerning the unlawful termination of another employee.

WE WILL NOT prohibit distribution of union literature at our centers in the absence of a valid work rule restricting distribution of literature there.

WE WILL NOT tell you that union literature may not be distributed because some of its statements are personally offensive to a center's director.

WE WILL NOT tell you that union activities are allowed during work time only so long as the center director does not personally disapprove of them.

WE WILL NOT create the impression of surveillance of your union activities.

WE WILL NOT schedule employee-meetings timed to interfere with a union's already scheduled meeting with you.

WE WILL NOT prematurely grant wage increases to discourage you from supporting a union.

WE WILL NOT issue warning memos to, discharge or otherwise discriminate against Jan

Radder and Rose Ryan, or any other employee, because of their support for, and activities on behalf of, the above-named union, or any other union, nor to discourage other employees from supporting the above-named union or any other union.

- 5 WE WILL NOT, in any like or related manner, interfere with, restrain or coerce you in the exercise of the rights set forth above, which are guaranteed by the National Labor Relations Act.

- 10 WE WILL, within 14 days from the date of this Order, offer Jan Radder full reinstatement to the position of head teacher from which he was discharged on March 7, 1997, and WE WILL, within 14 days from the date of this Order, offer Rose Ryan full reinstatement to the position of assistant teacher from which she was discharged on February 20, 1997, or, if either of those positions no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges which would have been enjoyed had those unlawful discharges not been made.

15 WE WILL make whole Jan Radder and Rose Ryan for any loss of earnings and other benefits resulting from our unlawful discharge of them, less any net interim earnings, plus interest.

- 20 WE WILL, within 14 days from the date of this Order, remove from our files the unlawful warning memo dated January 14, 1997, issued to Jan Radder and, in addition, remove from our files any reference to the unlawful discharges of Jan Radder and Rose Ryan, and WE WILL, within 3 days thereafter, notify Radder and Ryan in writing that this has been done and that the unlawful warning notice and unlawful discharges will not be used against them in any way.

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PARENTS IN COMMUNITY ACTION, INC.

(Employer)

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Dated _____ By _____
(Representative) (Title)

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This is an official notice and must not be defaced by anyone.

- 45 This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 110 South 4th Street, Room 234, Minneapolis, Minnesota 55401-2291, Telephone 612-348-1793.